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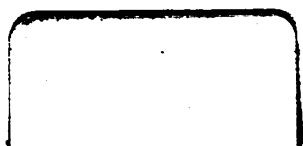
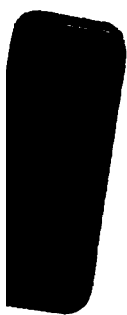
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**LAWRANCE'S
BENGAL LAW REPORTS**

BEING

**DECISIONS OF THE HIGH COURT AT
CALCUTTA,**

AND

**OF HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.**

ON

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GASPER GREGORY, INNER TEMPLE.

C. P. HILL, INNER TEMPLE.

F. S. COLLIS, MIDDLE TEMPLE.

C. H. REILY, MIDDLE TEMPLE.

AMEER ALI, INNER TEMPLE.

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JUDGES OF THE HIGH COURT.

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„ A. G. MACPHERSON, *Officiating Chief Justice.*

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„ L. S. JACKSON,

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Puisne Judges.

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BENGAL LAW REPORTS.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson.

C. HALFORD (PLAINTIFF) *v.* THE EAST INDIAN RAILWAY
COMPANY (DEFENDANTS).

*Railway Company—Fire caused by Spark from Engine—Action for
Damages—Negligence—Statutory Powers.*

1874
May 22 &
26; and
June 17.

The East Indian Railway Company was incorporated under 12 & 13 Vict. c. xliii "for the purpose of making, and constructing, working and maintaining" the East Indian Railway, "including all necessary accessory or convenient extensions, branches, &c., as might be agreed upon between the Railway Company and the East India Company; and by agreement between the Railway Company and the East India Company, dated 17th August 1840, the Railway Company was "authorized and directed to make and maintain such stations, offices, machinery and other works and conveniences connected with the making, maintaining and working the Railway," and "to provide a good and sufficient working stock of engines, carriages, and other plant and machinery for working the said railway." The plaintiff was the owner of a piece of land adjoining the railway line at Kharmatta, a station on the Chord Line of the Company's railway, on which land was erected a bungalow, with stables and out-houses adjoining. In an action brought by the plaintiff against the Railway Company to recover compensation for damages occasioned by a fire caused by a spark from one of the engines of the Company, the plaintiff alleged want of due care on the part of the defendants in the management of the line by allowing dry grass of too great a length to remain on the railway banks, and in driving their engines along the line without due precautions being taken to prevent the expulsion of sparks. *Held*, that the defendant Company was authorized to run locomotive engines on the lines of railway constructed by the Company under the statutory powers given to it, and, therefore, the Company were not liable for damage caused in working the line under such statutory powers, without proof of negligence. *Held* also on the evidence, that neither in the construction of their engines, nor in the condition of the railway banks, was any negligence shown on the part of the Company.

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APPEAL from a decision of Pontifex, J., dated 22nd April

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Suit to recover Rs. 6,500 as damages sustained by the plaintiff by reason of the negligence of the defendants. The plaint alleged that the plaintiff was the owner of certain land and a bungalow with stables and other out-offices thereon, at Kharmatta, a station on the Chord Line of the East Indian Railway, which was in the possession, and under the management, of the defendant Company; that, on 24th March 1873, by the negligence of the defendant Company, and the want of due care in the management of their line, the dry grass, which was allowed to remain on the railway banks, became ignited by sparks of fire emitted from one of their locomotive engines, which was driven along the line without due precautions being taken to prevent the expulsion of sparks; and that the fire thereby occasioned spread from the defendants' line of railway and banks into the plaintiff's land, which closely adjoined the line near the point where the fire originated, and set on fire some thatching grass which was stored thereon, and thence spread to and destroyed the bungalow and out-houses belonging to the plaintiff, in respect of which the damages were claimed.

The defendants stated in their written statement that they were a corporation empowered by Statute to use locomotive engines on the line of railway in question; that the engines employed by them were properly constructed, and such as they had a right to use; that they had used all due care in the management of their engines, and had not been guilty of any negligence in the use of such engines. The defendants denied that there had been on their part any want of due care in leaving grass on the banks of the railway, and that the fire by which the plaintiff's bungalow was burnt down was caused by sparks from their engines as alleged in the plaint; but they alleged the fire had arisen from the ignition, by some means for which they were not responsible, of the thatching grass stored on the plaintiff's land, and was thence communicated to the buildings destroyed. They further submitted that, even if the fire had originated on their premises, and from their

negligence, there was such contributory negligence on the part of the plaintiff as disentitled him from recovering.

The defendant Company was incorporated under 12 & 13 Vict., v. xciii, for the purpose of making, and constructing, working, and maintaining the East Indian Railway, "including all necessary accessory or convenient extensions, branches, stocks, and works as may be agreed upon by the Railway Company and the East India Company; and also of doing and performing all such matters and things necessary or convenient for carrying into effect the object and purpose aforesaid;" and by an agreement of 17th August 1849, entered into under that Statute between the East India Company and the Railway Company, and subsequently confirmed by the Imperial Government, the Railway Company was authorized and directed to make and maintain such stations, offices, machinery and other works and conveniences (connected with the making, maintaining, and working the railways) as might be deemed necessary and expedient by the East India Company, and "to provide a good and sufficient working stock of engines, carriages, and other plant and machinery for working the said railway."

The material facts and evidence are sufficiently stated in the judgment appealed from, which was delivered by

PONTIFEX, J.—This case is almost the same in its circumstances as the case of *Smith v. The London and South Western Railway Co.* (1), but with a difference to which I shall presently refer.

The plaintiff is the owner of a piece of land adjacent to the Chord Line of the East Indian Railway Company, about two hundred and fifty yards nearer Calcutta than the Kharmatta station. Between such piece of land and the railway runs a public road about twenty feet wide, of which only the centre portion is used for traffic. The plaintiff's land was separated from the road by a wooden fence, and on such land, in a line proceeding east from the railway, stood a stable about seventy-five feet from the railway fence, then a bath house, and then, at some

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distance, a bungalow. On the morning of the 24th March 1873, and for some few days previously, two heaps of thatching grass were lying on the land between the road and the stable. Opposite, and to the west of the plaintiff's land and the public road, the defendants' railway runs through a cutting of a depth for some distance of from eight to ten feet, and gradually diminishing in depth as it approaches the station. The railway is separated from the road by a wire fence. The eastern bank of the railway and cutting was covered with growing grass. With respect to the length of such grass there is a considerable conflict of evidence.

About half-past ten on the morning of the 24th of March 1873, a fire occurred, which burnt the grass growing on the eastern bank of the railway, the heaps of the thatching grass, the stable, and the bungalow. Certain out-houses and trees were also burnt.

The plaintiff alleges that the fire was caused by the emission from a passing engine of live sparks or cinders, which were blown by a strong westerly wind prevailing at the time on the railway embankment, and setting fire to the grass on the embankment; that such fire spread, crossed the road, and occasioned the damage, of which the plaintiff complains, and which, in his plaint, he states to amount to Rs. 6,500.

The defendants deny that the fire was caused by any passing engine, and they have adduced evidence with a view to show that no train in fact passed at the time when the fire must have originated.

This evidence is to my mind not satisfactory; and I am prepared to find that an engine did in fact pass at the time when the fire originated, and, in the absence of other evidence, did in fact occasion the fire, and that the fire commenced first on the railway bank, and was communicated therefrom to the plaintiff's premises.

Under this state of circumstances, the plaintiff claims to be compensated for the damage he has sustained by the fire. The claim is supported on two grounds. First, that the defendants had no statutory power of running locomotive engines, and therefore are responsible for the damage occasioned by the fire, according to the principles laid down by the Court of Queen's Bench in

Jones v. The Festiniog Railway Co. (1). I said during the argument, and I am still of opinion, that the East Indian Railway Company have a statutory power of running locomotive engines on this Chord Line; and therefore, according to the principles of the decisions in *Vaughan v. The Taff Valley Railway Co.* (2) and *The Hammersmith Railway Co. v. Brand* (3), unless they are proved to have been guilty of negligence, they are not responsible for the consequences of the fire. To use the words of Cockburn, C.J., in *Vaughan v. The Taff Valley Railway Co.* (2), "When the Legislature has sanctioned the use of a particular means for a given purpose, it appears to me that that sanction carries with it this consequence, that the use of the means itself for that purpose (provided every precaution which the nature of the case suggests has been observed) is not an act for which an action lies, independent of negligence."

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The second ground on which the plaintiff rests his claim is, that the defendants were in fact guilty of negligence, and were therefore responsible for the result of the fire, even though they could not have reasonably anticipated that the damage which actually happened would occur. I agree that if the defendants were guilty of negligence, the case would be governed by *Smith v. The London and South Western Railway Co.* (4), and the plaintiff would be entitled to recover.

Now the negligence imputed is two-fold: first, with respect to the construction of the engine; and, second, with respect to the condition of the railway banks: and it is necessary to deal separately with these particulars.

With respect to the engine, the defendants have produced for the inspection of the plaintiff and his witnesses the engine No. 508, which they say was the engine of the No. 10 goods trains, and was the only engine that could have passed at or before the commencement of the fire.

Assuming the fire to have been occasioned by the engine, the plaintiff's case is that it may have happened either from sparks emitted from the funnel, or from live coals or cinders dropped

(1) L. R., 3 Q. B., 733.

(2) 29 L. J., N. S., Ex., 247.

(1) L. R., 4 H. L., 171.

(4) L. R., 5 C. P. 98; S. C. in Ex.
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from the ash-pan of the engine ; and he insists that the defendants must be considered guilty of negligence unless appliances were attached to the funnel and ash-pan to confine or arrest the sparks and cinders. It is not disputed that, in other respects, the engine is of the best construction. The plaintiff's witnesses have proved that appliances called spark-arresters or catchers are frequently attached to, or connected with, engine funnels for the purpose of preventing the emission of sparks.

On the other hand, the defendants have produced evidence to show that such appliances are only used with engines designed to burn wood fuel ; that an exclusively coal-burning locomotive engine in India, or in England, is ever furnished with such appliances ; and that such appliances could not be constructed to arrest the small sparks emitted from coal-burning locomotive engine funnels, without unreasonably interfering with the working of the engine.

I am myself inclined to think that the fire was more probably occasioned by a live coal or cinder from the ash-pan than by a spark from the funnel. But however this may be, I am of opinion upon the evidence that the defendants were not guilty of negligence so far as relates to the construction of the engine funnel, and that in that respect the engine was properly constructed and worked.

With respect to the ash-pan, only one of the plaintiff's witnesses has spoken to the possibility of any appliance for preventing the falling of live coals or cinders when steam is on, and that appliance has only been used with engines of very recent construction designed for the partial consumption of wood as fuel. I am of opinion on the evidence that the defendants' engine was properly constructed and worked, so far as relates to the ash-pan, and that the charge of negligence with respect to the engine fails ; and, therefore, on the first head of negligence, I find in the defendants' favour.

The other imputation of negligence relates to the condition of the railway banks. The plaintiff's witnesses have stated that the grass on the banks had been cut about two months before the fire, and that, at the time of the cutting, it was about six feet in length, of which about two feet were left standing. On

the other hand Mr. Roberts, an inspector of works on the East Indian Railway line, whose residence is close to the station, and who was in his house when the fire commenced, has positively sworn that the grass on the steeper part of the cutting was only from six to eight inches long, while on the less steep slope it had been eaten down by cattle. He further states, that the grass on the embankment had been cut only about a fortnight, or it might be three weeks, before the fire; that it was rather thick and very dry; and that he had himself seen it after it was cut, and that it had not regrown, and that it was part of his duty to look after the banks. I may observe that this witness did not appear to give his evidence at all hostilely or unfairly to the plaintiff.

Taking it therefore, as I am prepared to find, that the grass was about a foot high, would that fact be conclusive evidence of negligence on the part of the Railway Company? It seems to me that if I were to hold that leaving grass a foot high along the line of railway was such negligence as would render the Railway Company responsible for damage like that occasioned by this fire, it would, in this country, be equivalent to imposing upon them an impossibility,—namely, the duty of keeping the banks of their line trimmed like a lawn, or altogether preventing vegetation thereon. The imposition upon them of such a liability as that was not, in my opinion, intended by the Legislature which gave them power and authority to run trains and locomotive engines: and I, accordingly, find that the defendants were not guilty of negligence so far as relates to the condition of the railway banks.

But it has been very strongly urged upon me that the case of *Smith v. The London and South Western Railway Co.* (1) is in fact an authority to show that the condition of the railway bank in this case was in itself conclusive proof of negligence. In *Smith v. The London and South Western Railway Co.* (1), the circumstances were as follows:—It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary

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of the defendants' land; beyond the hedge was a stubble field, bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire, the defendants' servants had trimmed the hedge and cut the grass and left the trimmings and cut-grass along the strip of grass. On the morning of the fire, the Company's servants had raked the trimmings and cut-grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of grass-land forming part of the defendants' property; the fire spread to the hedge and burnt through it, and caught the stubble field, and a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence except the fact that the engines had recently passed, to show that the fire originated from them; there was no evidence whether the fire originated in one of the heaps of trimmings, or on some other part of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire.

The Judge on the trial does not appear to have charged the jury, but a verdict was taken by consent for the plaintiff, subject to leave reserved to set it aside on the ground that there was no evidence of negligence, to go to the jury. A rule was accordingly obtained in the Court of Common Pleas, and was after argument discharged. Upon an appeal to the Exchequer Chamber that decision was affirmed.

After a careful perusal of the report of *Smith v. The London and South Western Railway Co.* (1), I am of opinion that no one of the Judges before whom that case was argued would, even under the circumstance of that case, if sitting as a jury, have found that the defendants were guilty of negligence. But there being circumstance which ought properly to have been mentioned to the jury as data from which they were to find whether there had or had not been negligence, and a

(1) L. R., 5 C. P., 98; S. C. in Ex. Ch., L. R., 6 C. P., 14.

verdict having been taken by consent at the time, which would only be set aside if there was no evidence to go to the jury none of the Judges considered himself justified in disturbing that verdict.

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But in that case there appears to me to be a particular negligence of a material character, and which is not to be found in the present case. I refer to the heaps of hedge trimmings and cut-grass raked together on the railway bank. It seems to me that the Judge in that case looked upon this collection into heaps in the light of an active proceeding on the part of the Railway Company in a slight decree comparable to strewing petroleum or other inflammable matter along the line. Had these raked together heaps not existed, I take it that every one of the Judges in *Smith v. The London and South Western Railway Co.* (1) would have decided that there was nothing on which to base a charge of negligence.

In the Exchequer Chamber, the Judges make the following observations. Kelly, C. B., said: "I think, then, there was negligence in the defendants in not removing those trimmings, and that they thus became responsible for all the consequences of their conduct." Martin, B., said: "There was evidence of the trimmings being improperly left by the side of their line, and that a spark from a passing engine fell on them and caused the fire, which was thus due to the defendants' negligence." Blackburn, J., said: "I have still some doubts whether there was any evidence that they were negligent, but as all other Judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed." He then goes on to say: "I agree that if they have the land at the edge of the line in their own occupation, they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate. I have no doubt that if the Company strewed any thing very inflammable,

(1) L. R., 5 C. P., 23; S. C. in Ex. Ch., L. R., 6 C. P., 14.

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such as, to put an extreme case, petroleum along the side of their line, they would be guilty of negligence. The reasoning for the plaintiff is that the dry trimmings were of an inflammable character, and likely to catch fire." Further on he says: "I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge; but I doubt on this point, and, therefore, doubt if there was evidence of negligence." Pigott, B., says: "Keating, J., says, that he was pressed with the consideration that leaving some very inflammable substance along the side of the line where trains were frequently passing, was some evidence of negligence. It comes to this, that, in a dry summer, with a knowledge of the risk of fire which must be caused, the defendants left heaps of combustible matter along the side of their lines; then, whether the fire did arise from those heaps was a question for the jury, and it seems clear that it either came from, or was at any rate increased by, the heaps." Lush, J., says: "the heaps added to the intensity of the fire, and thus caused it to burn the hedge and stubble."

On the whole, therefore, I am of opinion that there is such a material difference between the facts of this case and the case of *Smith v. The London and South Western Railway Co.* (1) that the latter is no authority binding me to decide in favor of the plaintiff; but, on the contrary, except under its peculiar circumstances, it is an authority upholding the decision in *Vaughan v. Taff Vale Railway Co* (2).

I must, therefore, dismiss the suit, and as the plaintiff wholly fails, I must dismiss it with costs, but of course it will be in the discretion of the defendants whether they exact such costs.

From this decision the plaintiff appealed on the following grounds:

That the Judge was wrong in holding that the defendant Company had power to use locomotive engines upon the Chord Line near the plaintiff's land without being liable for injuries caused by such engines, unless caused by actual negligence on the part of the defendant Company.

(1) L. R., 5 C. P., 98; S. C. in Ex. Ch., L. R., 6 C. P. 14.

(2) 5 H. & N., 679.

That the Judge was wrong in holding that the defendant Company was not guilty of negligence in the construction, management, or working of the engine which he found caused the fire; nor in the care and management of the banks of the railway near the plaintiff's land.

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Mr. *Lowe* and Mr. *Phillips* for the appellant.

Mr. *Evans* and Mr. *Macrae* for the respondents.

Mr. *Phillips* contended, that the defendant Company was using their line of railway without any such powers as would render them exempt from liability in respect of the damage complained of, unless there was proof of negligence on their part. The Company employs locomotive engines at its own risk; it had no such express legislative authority to employ locomotives as would make it necessary for the plaintiff to prove actual negligence on the part of the Company. In *The King v. Pease* (1) the Company had statutory authority to use engines, but that case shows that they would have been liable for the nuisance caused, if there had been no such authority; or at least they would have had to show that all practicable means had been taken to prevent it. So in *Vaughan v. The Taff Vale Railway Co.* (2). In that case also the Company had legislative authority to use engines, and had taken precautions to prevent damage being done by employing them. From that case it appears that if there had been no such authority, the not taking all reasonable precaution to avoid accidents would be a proof of negligence, and the Company would have been liable. [COUCH, C.J.—It does not follow that anything short of the precautions there used would have been proof of negligence.] It is submitted so from the ground on which the decision is given. [COUCH, C.J.—There must be negligence in using the engines, or negligence in using a badly constructed engine. If it be negligence not to use all the latest scientific appliances for preventing sparks, &c., the case of *Smith v. The London and South Western Railway Co.* (3) would have been decided without considering whether leaving the heaps of grass at the side of the line was

(1) 4 B. & Ad., 30.

(2) 5 H. & N., 679.

(3) L. R., 5 C. P., 98; S. C. in Ex. Ch., L. R., 6 C. P., 14.

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negligence.] 'All reasonable precautions must be used, and the cases cited show that if such precautions are not used there is negligence in running the locomotives; see *Brand v. Hammersmith Railway Co.* (1). A Company is bound to use the powers given to it not in a negligent manner—*Biscoe v. Great Eastern Railway Co.* (2), *Freemantle v. London and North Western Railway Co.* (3). In the latter case evidence was given by the defendants to show that the engine was so constructed that it was unnecessary to use any safeguards or appliances, which on behalf of the plaintiff it was suggested might have prevented the accident; and it was there found there was negligence on the part of the defendants in not using such appliances. If a Company has not express powers given them to use locomotive engines, they are liable for the injury done by employing them: general words are not sufficient to give the power—*Jones v. Festiniog Railway Co.* (4). The learned Counsel went through the Acts giving powers to the East Indian Railway Company, 12 & 13 Vict., c. xciii; 16 & 17 Vict., c. cccxvi; 19 & 20 Vict., c. cxxi; 27 & 28 Vict., c. clvii; and contended that they contained no express provision empowering the Company to use locomotives [Couch, C.J.—You cannot take what is said with reference to the case of *Jones v. Festiniog Railway Co.* (4) as applicable to such a line of railway as this. MACPHERSON, J.—In *Jones v. Festiniog Railway Co.* (4) the employment of locomotives was never contemplated by the Legislature in giving the statutory powers.] See *per* Blackburn, J., in the *Hammersmith Railway Co. v. Brand* (5), where he says that where there is no express authority to use engines the Company might employ them but on the terms of being liable for injury done by their use. See also *Rajmohun Bose v. East Indian Railway Co.* (6), where it was held that the defendants did not escape liability for a nuisance caused by the erection of certain workshops, &c., near the plaintiff's premises, on the ground that

(1) L. R., 4 H. L., 177; at pp. 201. (4) L. R., 3 Q. B., 733.
 202. (5) L. R., 4 H. L., 199.

(2) L. R., 16 Eq., 636.

(6) 10 B. L. R., 241.

(3) 10 C. B., N. S., 82.

the nuisance had been caused by them in the reasonable exercise of powers conferred on them by the Legislature. [MACPHERSON, J.—In that case there was no necessity to erect the workshops in the particular place where they were erected; they might have been put elsewhere. Here the Company are obliged to run their engines over the portion of the line where the fire occurred.] In the case of *Rajmohun Bose v. East Indian Railway Co.* (1) it is said, "It cannot be said that the Government, simply because in the exercise of statutory powers it has taken the land on paying its value, can create a nuisance on it to the injury of the owner of the adjoining land." In Act VI of 1857, s. 24, provision was made for compensation to persons whose land was taken; the original Act of the Company did not contemplate any damage to individuals, for they did not give them any compensation. Acts giving powers of this kind must be construed strictly against the Company, and liberally in favor of the public—*Parker v. Great Western Railway Co.* (2); *Scales v. Pickering* (3); see also *Clowes v. Staffordshire Potteries Waterworks Co.* (4). The defendants were guilty of negligence also in keeping the grass on the bank at the height at which it was: the fact of the fire having occurred by igniting the grass goes to show that the evidence of the plaintiff's witnesses in saying the grass was long is more correct than those of the defendants, who allege it was cut short.

Mr. Lowe on the same side went at some length into the evidence as to the length of the grass: the Company would be bound to keep it at such a length as would be reasonably likely to prevent danger from its becoming ignited by passing trains; as it had become ignited it was a reasonable presumption that they had not done so. The defendants had dug a trench between their premises and the plaintiff's since this damage occurred; though before it had not been thought necessary to do so: there was evidence of negligence on the part of the defendants.

(1) 10 B. L. R., 241; at p. 252.

(2) 7 M. & G., 253; at p. 288.

(3) 4 Bing., 448; at p. 452.

(4) 8 L. R., Ch., 135.

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Mr. *Evans*, for the respondents, went at some length into the Acts under which the Company was empowered to construct the line, &c., and especially 12 & 13 Vict., c. xciii; and contended that the Company had power, under the provisions contained in those Acts, to run locomotive engines on their line. The word "locomotive" is used expressly in the Subscription Contract [Mr. *Lowe*.—That is not in evidence in the case.] If, however, there were no express mention of locomotives contained in these Acts, by giving power to construct a railway of the size and nature contemplated by the Acts, the Legislature must be presumed to have intended that power to use locomotives should be included. The length of the line and the magnitude of the works connected with it preclude the idea of its being worked without locomotives. Unless, therefore, the Legislature have wholly failed to carry out their intention by words, the Company has power to use locomotive engines; and, therefore, unless there was negligence on their part, they are not liable. The learned Counsel then contended on the evidence that the defendants had not been guilty of any negligence with regard to the construction of their engines; the evidence showed they were well constructed, and were similar to those in ordinary use. Taking the test of negligence as in *Blamires v. The Lancashire and Yorkshire Railway Co.* (1), there was no negligence in this respect on the part of the Company. Further as to the state of the banks, there was no negligence with regard to them: the injury done was not of such a character as the defendants could have contemplated as the ordinary or likely consequence to result from the necessary use of their line; see *per Bovill, C.J.*, in *Sharp v. Powell* (2).

Mr. *Lowe* in reply.

Cur. adv. vult.

The judgment of the Court was delivered by

COUCH, C.J.—The plaint in this suit stated that the plaintiff was the owner of a bungalow and dwelling house, with

(1) L. R., 8 Ex., 283.

(2) L. R., 7 C. P., 253; at p. 258.

stables and out-offices thereto adjoining, at Kharmatta, and the defendants were possessed of, and had the care and management of, a line of railway, called the Chord Line, running near the said bungalow and premises, with banks belonging thereto and forming part of the said railway; and were possessed of locomotive engines containing burning substances, which engines were used and employed by the defendants for the drawing and propelling of carriage, wagons, and trucks along the said line of railway; yet by the negligence and improper conduct of the defendants and the want of due care and management of their said line of railway, banks, and engines, the dry grass, which was allowed and permitted to be and remain upon the railway and bank, became and were ignited by sparks of fire emitted from a locomotive engine of the defendants, which, with a goods train attached thereto, was driven along the line of railway near to the plaintiff's bungalow and premises without proper precautions being taken to prevent the expulsion of such sparks and fire from the engine. Pontifex, J., has dismissed the suit, and this is an appeal from his decision.

I concur with the learned Judge in the conclusion that it was shewn that the defendants had authority to use locomotive engines on this part of the railway. In fact the form of the plaint does not raise this question, for if the defendants had not, as was argued before us by the plaintiffs' Counsel, and I believe before Pontifex, J., also, authority (by which I mean legal authority) to use locomotive engines on that part of the line, it was not necessary to make in the plaint the allegation of negligence which the plaintiff made. The plaint is drawn, as it might be expected to be, on the supposition that the East Indian Railway Company had, as I should think that everybody would conclude that they had, authority to use locomotive engines on the Chord Line. It would be extraordinary if they had not lawful authority to do so, and had only power to use the line as the small line in England of the Festiniog Railway was authorized to be used.

The real question in this case is whether there was negligence on the part of the Railway Company or their servants; and in considering this I cannot do better than quote the language of Williams, J., in *Freemantle v. The London and*

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North Western Railway Co. (1), in which the subject of negligence on the part of railway companies, in cases like this, was fully considered, and there was a most careful summing up of the evidence by the learned Judge. Williams, J., after laying down that it was necessary to prove negligence, says: "Now, gentlemen, it remains to consider what is to be regarded as negligence on the part of the Company for the consequences of which they are to be held responsible. Now, as to that, the Company, in the construction of their engines, are not only bound to employ all due care, and all due skill, for the prevention of mischief accruing to the property of others, by the emission of sparks or any other cause, but they are bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided that they are such as, under the circumstances, it is reasonable to require the Company to adopt." Upon an application to the Court of Common Pleas for a new trial in that case, the learned Judges held that the summing up to the jury was quite correct, and that no fault could be found with it.

In a later case Sir William Erle laid down the rule as to negligence. In *Ford v. London and South Western Railway Co.* (2), that eminent Judge said: "A railway company is bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested." In a still later case before Keating, J.,—*Dimmock v. North Staffordshire Railway Co.* (3)—the jury found that there had been no negligence on the part of the Company, in the omission of means to prevent the emission of sparks from their engines, the means suggested being such as practical men stated would impede the engines and would not be effectual for the object. This I consider is the law as to the liability of railway companies for the emission of sparks or fire caused by the use of their engines.

In the present case there certainly is not evidence that the engine, which was used on this occasion, was negligently con-

(1) 31 L. J., N. S., C. P., 12.

(3) 4 F. & F., 1058.

(2) 2 F. & F., 730.

structed and different from the engines of the best construction which are now in use. The witnesses show that it was an engine of the best construction of the kind, and that no appliances were omitted which, under the circumstances, it would be reasonable to require the Company to adopt. It appears to me that both in respect of the construction of the engine and the mode in which it was used by the servants of the Company at the time, there was no evidence of negligence which would make them liable for the consequences of the fire.

But the Company are bound not only to use due care in the construction and use of their engines, but also to use due care in keeping the line of railway and the land belonging to them on each side of it in a proper state. This appears from the case of *Smith v. London and North Western Railway Co.* (1); which is referred to by Pontifex, J., in his judgment, where it was sought to make the Railway Company liable, not on account of any defect in the construction of the engine or of not adopting means to prevent the emission of sparks or the falling of live cinders from the ash-pan, but because the servants of the Company had allowed dry grass to be on the land of the Company on each side of the railway in what was alleged to be a negligent manner, and that thereby the fire was caused which burnt the plaintiff's cottage. Bovill, C.J., in his judgment in that case says: "Seeing that the defendants were using dangerous machines, that they allowed the cuttings and trimmings to remain on the banks of their railway, in a season of unusual heat and dryness, and for a time which, under these circumstances, might be fairly called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible material, and that the fire did in fact extend to the cottage, I think it is impossible to say that there was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were was the natural consequence of their negligence."

(1) L. R., 5, C. P., 98; at p. 106.

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Now, in considering whether there was due care in keeping the land of the Company on each side of the railway in a proper state, we must keep in mind (as is said by Bovill, C.J.,) that if the Company are using an engine which emits sparks and causes a risk of fire; it is incumbent on them, although they may be entitled to use it, to keep the line of railway in a proper state with reference to such danger. We have therefore to consider whether, on the evidence in this case, the plaintiff has shown that there was negligence on the part of the servants of the Company in the manner in which the grass had been cut and the state in which it had been allowed to remain up to the time when the fire happened.

The plaintiff's witness, Aboo Khan, said, that "when the grass was cut, about two feet from the root were left, and the top only was out. When the grass was out, it was about the height of a man. It was out to thatch bungalow, and for what other purpose I don't know." In another part of his evidence he said: "The railway grass has been cut about two months before the fire; about two feet were left; the top was cut off. It was dead, and was dry grass." The next witness, the Malee, said, that "the grass was jungly grass—straw—stumps of ugly grass, of which the top had been cut off; about two feet was the height of the stumps." The other witnesses for the plaintiff, Bolakee, Jeetun Mundle, and Doolub Roy, all depose to the same effect. In fact there was a similarity in this respect in the evidence of the plaintiff's witnesses, which is not at all unusual in this country.

A witness for the defendants, the engine-driver, said, "the grass was from six inches to a foot high." Browsmith, the guard, spoke of it as about two feet high. As to him, part of his evidence is such that it cannot be believed. When he spoke about the fire, he wished it to be believed that it had actually broken out before the train arrived at the spot. That part of his evidence is, to my mind, utterly untrustworthy. It is, however, possible that when he spoke of the height of the grass, he was saying what he believed to be true.

Mr. Roberts, a very important witness, the gentleman who had charge of that part of the line, said on this subject,—“at the time the fire took place the grass on the Railway Company's

land was from six to eight inches long as far as the fence. On the steep slope, it was six to eight inches long. On the right slope it was eaten down by cattle. The grass on the embankment had been cut before,—about a fortnight before. I don't know personally who cut it. I had given leave to my Baboo to cut it." The Baboo was not called. It would have been more satisfactory if we had heard what he had to say. But Mr. Roberts appears to me to be a gentleman whose evidence may be fully trusted, and Pontifex, J., remarks in his judgment, that he did not appear to be in any way hostile to the plaintiff. It would not be right to infer from his being a servant of the Railway Company, and holding the position which he did at this time, that his evidence is given more in favor of the Railway Company than he justly believed it should be. I place considerable reliance on what Mr. Roberts has said. Then Mr. Prestage, who is a gentleman of considerable experience, and whose evidence on this matter is from his position very valuable, says, that "the Railway Company could not engage at reasonable cost to keep the bank free from grass." He showed that the question is at what height the grass should be allowed to remain after it has been cut; and said that on his Railway the grass would be left at from six to eight inches in height. This is what Mr. Roberts speaks to, and is the height at which in my opinion it was left at this place.

There is another witness whom I have not yet noticed, who may help us in coming to a conclusion on this point,—Mr. William Halford, the brother of the plaintiff, who went to the place five days after the fire. It occurred on the 21th of March, and he says that he arrived at the place on the 29th. Now I think it cannot be supposed from the evidence in the case that the fire had burnt the grass on the line of railway in every place so completely that if, as the plaintiff's witnesses say, it was left two feet high, there would not have been on some parts of the bank,—perhaps not close to where the plaintiff's bungalow had been, but in other parts,—grass of that height. It is not likely that in cutting the grass they would only leave that part of it which was near the bungalow, and where the fire happened, two feet high and cut it lower in other parts. It appears to me

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improbable that if, on the 29th of March, when Mr. William Halford went to the spot, there had been any appearance of the grass having been in the state which the plaintiff's witnesses describe, he would not have noticed it. It is possible that he might not; but it appears to me improbable that when he came down to look at the effects of the fire which had destroyed his brother's property, and which would be immediately supposed to have arisen from an engine on the railway, he would not have observed any appearance, if there were any, of negligence on the part of the Railway Company in the state in which the grass had been left. He said fairly that he did not recollect noticing anything of the kind. He said: "The cleared remain- which I saw at the railway premises appeared to me to have been grass; I don't recollect what was the length of the grass which was not burnt. There was no appearance of any grass having been burnt on the road. As far as appearances went, it appeared that there were two distinct fires altogether, one on the railroad and another on our premises." This agrees with the evidence that there was a portion of land, where the road was, which was free from grass, or on which the grass was so slight that there would not be any appearance of fire. It appears to me therefore that Mr. William Halford, in this absence of any recollection of the appearance of the grass where it had not been burnt, confirms the evidence which Mr. Roberts gave as to the state in which the grass was left. It was incumbent on the plaintiff, who charges that the fire was caused by the negligence of the defendants, to satisfy the Court that there was negligence. And if the case is left in such a state, and the evidence is so evenly balanced, that it is impossible for the Court to say that there was negligence, we should not be justified in making the defendants liable. We must be satisfied that they were guilty of negligence before we can make them liable for the consequences of the fire, however unfortunate that may be for the plaintiff. We cannot help sympathizing with a gentleman who has suffered a loss like this, but still we must see whether it is made out by the evidence there there was negligence on the part of the defendants. I think it has not been made out. The evidence does not satisfy me that the grass was

left in the state which is described by the plaintiff's witnesses or in a state other than what Mr. Prestage says it might fairly and reasonably be left. And the fact that we are asked to reverse the decision of the Judge who tried the case, must not be left out of consideration. upon the whole, therefore, after carefully going through the evidence in this case, and considering it, I am unable to say that the decision of Pontifex, J., is wrong, and I think that the appeal ought to be dismissed with costs.

Appeal dismissed.

Attorneys for the appellant : Messrs. Berners, Sanderson, and Upton.

Attorneys for the respondents : Messrs. Chauntrell, Knowles and Roberts.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

GOPALNARAIN MOZOOMDAR AND ANOTHER (TWO OF THE DEFENDANTS)
v. MUDDOMUTTY GUPTEE (PLAINTIFF) AND SHOSHEEBHOOSUN
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MUDDOMUTTY GUPTEE (PLAINTIFF) v. BAMASOONDERY DOSSEE
(DEFENDANT).

Hindu Law—Will—Joint, Family—Powers of Kurta—Limitation—Acknowledgment by Kurta or by Executor under Hindu Will—Clause for Payment of Debts—Charge—Acquiescence—Guardian under Act XL of 1858—Appeal—Act VIII of 1858, ss. 337 and 343—Mortgage—Decree for Sale and Payment of Deficiency—Costs.

H, a Hindu, died leaving two adult and two minor sons, and having made a will or *anumatipatra* addressed to his two eldest sons L and G, whom he there by appointed *malik mukhtars* of the whole of his estate with full powers of management. He directed them to maintain his widow and minor sons, and to pay the marriage expenses of the latter out of the joint estate; and further directed them to pay his liabilities, and if necessary, to raise money for that purpose by sale or mortgage: the necessary documents to be signed by L and G, "the names of the infants being signed by you as guardians and executors." In case of the death of either L or G, the will provided that all the powers of the executors should be vested in the survivor, the minors to have the same powers upon attaining majority. The will further provided that the executors should, when the minors came of age; "make over

See also
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to them with explanation the share of each," and that the four sons should take the property in equal shares. *L* died after his father, leaving a widow, and having made a will whereof he appointed *G* executor, and *G* subsequently obtained a certificate under s. 7, Act XL of 1858, in respect of the property of his minor brothers. Thereafter *G*, by a deed in the English form, which was executed by him alone "as executor of *H*" and also "as executor of *L*," mortgaged a portion of the property to the plaintiff to secure Rs. 6,847-3-3. Of this sum Rs. 947-3-3 were advanced to *G* at the time of the mortgage, and were applied by him for the benefit of *H*'s estate, Rs. 1,000 were advanced to pay a debt due from *L* to third persons, the remainder being in respect of debts of *H*, all of which, however, with the exception of one debt of Rs. 100, were barred by the law of limitation. In a suit by the mortgagee for an account and sale or foreclosure of the mortgaged property, it appeared that one of the minors had attained his majority when the mortgage was executed and the other some years thereafter and that both had been informed of the mortgage several years before the suit, and had then raised no objections. No question as to the effect of the limitation law on the mortgage was raised on the pleadings or at the trial.

Held by MARKEE, J., that although the mortgage was not executed in accordance with the will of *H*, the younger sons had stood by and had taken the benefit of the transaction, and could not therefore question it. A member of a joint Hindu family is bound when he comes of age to make himself acquainted with the acts during his minority of the manager, and to express his dissent at once if he disapproves of such acts. *Held* also that Act XL of 1858 does not prevent a guardian, who has obtained a certificate thereunder, from selling or mortgaging property in Calcutta without the sanction of the Court.

No evidence having been offered as to *L*'s estate when the mortgage was executed, or that *L*'s widow knew of the mortgage, the suit must be dismissed as against her.

Held, on appeal, by GOUCH, C. J., and FORTUNE, J., that debts by Hindu law being a charge upon the estate of the debtor, and the intention of *H*, as shown by the provision in his will for the maintenance of his widow and minor sons, being that the family should for a time continue to be joint, no charge or trust was created by the clause in *H*'s will for payment of his debts, and therefore the fact that, in executing the mortgage, *G* professed to act under the will and not as *karta*, did not invalidate the mortgage. For the same reason, the clause for payment of debts could not prevent the operation of the law of limitation.

The manager of a joint Hindu family or the executor of a Hindu will, has no power by acknowledgment to revive, a debt barred by the law of limitation except as against himself.

G, as *karta* of the joint family, could not make a valid mortgage of *L*'s share separately from the shares of other members of the family; his estate therefore was liable to pay the plaintiff the Rs. 1,000 borrowed to pay *L*'s debt, and his representatives could claim to be repaid from *L*'s estate.

APPEALS from a decision of Markby, J., dated the 23rd July 1873.

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The plaintiff, who was the mortgagee of two houses in Calcutta which had originally formed part of the estate of one Hurrynarain Mozoomdar, a Hindu inhabitant of Trebanee Baushdeb-
pore in the District of Hooghly, sued for an account and sale or
foreclosure of the mortgage.

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Hurrynarain Mozoomdar died in 1849, leaving four sons, named Lukhinarain, Gourinarain, Gopalnarain, and Ramnarain, of whom the two latter were minors when their father died. Lukhinarain died in 1857, leaving a widow Bamasoondery Dossee, and having made a will whereof he appointed Gourinarain sole executor; but the will directed the executor before under-
taking or settling any important matter connected with the
testator's estate to obtain the written consent of one Chunder
Sikar Roy, or if he should be dead, that of Bamasoondery
Dossee. Gourinarain married a daughter of the plaintiff, and
died intestate in 1870, leaving a son Shosheebhoosun.

Hurrynarain, by a will or *anumatipatra* addressed to his two eldest sons, Lukhinarain and Gourinarain, appointed them *malik mukhtars* of his whole estate, and directed them to maintain and educate and provide for the marriage expenses of his two minor sons, and to maintain his widow out of the joint estate. The document proceeded :—

Having collected my outstandings you are to satisfy my liabilities if that should be insufficient, or if payment of the debts cannot be deferred till such time as the outstandings are collected, then, out of the aforesaid properties what in your judgment will be proportionable to the debts the same you will mortgage or sell, whichever may be expedient. Having done that you will satisfy the debts; the written documents thereof shall be signed and delivered by you two individuals, the names of the infants being signed by you as guardians and executors. . . . Should either of you two persons die, then he who will be the survivor will possess the powers written above, and each of the minors as he comes of age will have the same powers as yourselves. . . . After reference to all the *khattas* of my own time, and to the *khattas* containing the *jama-kharch* of the profits and losses during the time of your management, and of the payment of my debts and recovery of outstandings, and of the proper expenses and disbursements, you will, on my minor sons coming of age, make over

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to them with explanation the share of each in the whole of the estate written in the schedule signed by me, and in the profits and losses ; you will not commit any fraud therein. The necessary good acts, and the expenses and disbursements of the household and *Ishur Pooja* and as necessity may arise any requisite expenses and disbursements you may incur for the buildings, &c., on the minors coming of age, they will not be able to disallow or repudiate any of these necessary expenses or disbursements. Should you make any extravagant or unnecessary expenses or disbursements, for the apportioned share thereof you will be liable. And all the above-mentioned property and goods you uterine brothers will take in equal shares."

It did not appear whether Lukhinarain or Gourinarain had ever proved this will or obtained a certificate thereunder, but upon Hurrynarain's death they jointly took possession of his whole estate.

On the 25th September 1860 Gourinarain obtained from the Judge of Hooghly a certificate under s. 7, Act XL of 1858, in respect of the property of the minors.

Hurrynarain in his lifetime had been the banian of Messrs. Bagram and Cavorke of Calcutta. In this business he was succeeded by Lukhinarain, then by Gourinarain, and the latter was succeeded by his son Shosheebhoosun. The family continued joint in estate down to April or May 1870 ; but prior to that, namely, on the 19th May 1868, Gopalnarain and Ramnarain brought a suit for partition charging Gourinarain with misconduct in the management of the joint property : that suit, however, had not been brought to a hearing up to the time when the present suit was heard, and Markby, J., expressed his opinion that the delay had not been satisfactorily explained.

Before 1865 Gourinarain had from time to time borrowed money from his mother-in-law, the present plaintiff, for the purposes, as she alleged, of Hurrynarain's estate, giving her his receipts, and on the 4th of February 1865 he gave her a Bengali mortgage, for the sums advanced by her. Shortly thereafter he applied to her for a further loan which she, by her son's advice, refused to make, except upon receiving from Gourinarain a mortgage in the English form, and he accordingly, on the 24th March 1865, executed the mortgage upon which this suit was brought. It

purported to be given to secure Rs. 6,847-3-3, with interest at the rate of 12 per cent. per annum, and was executed by Gourinarain alone as "executor of Hurrinarain Mozoomdar" and also as "executor of Lukhinarain Mozoomdar." At this time Gopalnarain had attained his majority, but Ramnarain was under sixteen.

Neither the principal sum nor the interest having been paid the plaintiff instituted the present suit against Gopalnarain, Ramnarain, Shosheebhoosun, and Bamasoondery Dossee. She put in the family account books kept by Gourinarain to prove the advances made by her, and the existence of debts to third persons, some of whom were also called on her behalf to prove their debts, and that they were threatening to sue for the amounts due to them; and she also deposed to a conversation between Gopalnarain and herself relating to her mortgage which took place about the time when it was executed. The accounts filed by the plaintiff showed that of the principal sum of Rs. 6,847-3-3 secured by the mortgage, Rs. 1,000 were advanced to pay off a debt due from Lukhinarain to Messrs. Bagram and Co.; that only Rs. 947-3-3 were at the time of the mortgage advanced to Gourinarain for the purposes of Hurrinarain's estate; and that of the other debts in respect of which the mortgage was given, only one debt of Rs. 100 was not then barred by the law of limitation. The question, however, as to how far the validity of the mortgage was affected by the law of limitation was first raised in the argument on appeal, the point not having been taken either in pleadings, or at the hearing, or in the memorandum of appeal.

It was proved that interest had been paid on the mortgage debt for a very short period only.

The defendant Gopalnarain admitted he knew of the plaintiff's mortgage as early as 1866, but denied that he had ever been consulted with reference to it; while Ramnarain, who was about twenty-four years old when this suit was instituted, stated that he first heard of the mortgage at the Registrar's office in 1868, the reason given by him for his previous ignorance being that he left the management of his affairs wholly in the hands of Gopalnarain. Both these defendants brought various charges of fraud against the plaintiff and Gourinarain; they alleged in their written

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statement that the money was never advanced; that the plaintiff used often to stay in Gourinarain's house, and was well aware that the advances, if any, were unnecessary; that Gourinarain was in the habit of taking money belonging to the joint estate and paying it back as loans to the estate in the names of himself or of the plaintiff; and that this suit was brought at the instigation and for the benefit of the plaintiff's grandson, the defendant Shosheebhoosun; and that the account-books of the joint family had been tampered with and falsified.

The defendant Bamasoondery made similar charges of fraud, and denied that she had ever been consulted about, or had ever consented to, the mortgage.

Shosheebhoosun simply stated that he knew nothing of the mortgage, and put the plaintiff to strict proof thereof.

The following issues were settled:—

"1. Whether the advances alleged to have been made by the plaintiff, and in respect of which the mortgage was given, were really made by her?

"2. Whether these advances, if made, were made *bonâ fide*?

"3. Was the mortgage deed so executed as to constitute a valid and binding charge against the defendants or either of them?"

Mr. Woodroffe and Mr. Branson for the plaintiff.

Mr. Kennedy and Mr. Bonnerjee for the defendants Gopalnarain, Ramnarain, and Bamasoondery Dossee.

Mr. Lowe and Mr. Fergusson for the defendant Shosheebhoosun.

MARKEZ, J. (after shortly stating the facts, issues, and charges of fraud made in the defendants' pleadings, continued):—
 These charges the parties who made them have utterly failed to substantiate. I see nothing in the evidence to justify a doubt as to the honesty of Gourinarain's conduct in the management of the affairs of the family. I feel compelled to say that I consider the evidence of the two defendants Gopalnarain and

Ramnarain altogether untrustworthy. It appeared to me when they were under examination that they were wholly reckless as to what statements they made, and that they were ready to take any suggestion or make any assertion that answered their purpose for the moment. In many respects their evidence is at variance with their written statement, particularly as to portions of the allegations in paragraphs 2, 9, 10, 11, 12, and 17. It is incredible to me that all these erroneous statements can have been honestly made.

The plaintiff in this matter trusted no doubt very much to Gourinarain, who also, I have no doubt, intended to act fairly towards her as well as towards his own family: but, as often happens in these friendly arrangements, the contingency of any disturbance of the harmony which then existed was not properly provided for. A long deed was drawn up, with long recitals in the English form, and covenants for title, and so forth, but the covenants are of no avail, and the recitals in the most important part are utterly incorrect. For all purposes of the plaintiff's case, the Bengali instrument which the parties drew up for themselves is just as effectual, if not more so, than that subsequently drawn up.

Holding the opinion that I have expressed of the case of the plaintiff and of the defence which has been put forward to meet it, I should be most anxious to establish her claim.

The way in which Mr. Woodroffe puts his case is this:—He says that the “will” of Hurrynarain devises the estate to the two elder brothers for the benefit of the whole family; that upon the death of Lukhinarain, and during the minority of Gopalnarain and Ramnarain, Gourinarain was sole manager of the estate of Hurrynarain; that the sum of money for which the mortgage was given as a security was made up of Rs. 1,400, deposited with Hurrynarain by the plaintiff's father during his lifetime, Rs. 1,000 advanced by the plaintiff to pay off a debt due from Lukhinarain to Messrs. Bagram and Cavorke, and various other sums (which he has traced, but which I need not particularly specify) borrowed from the plaintiff in order to pay off liabilities which had been originally created in Hurrynarain's life time; that Gourinarain, as manager, had power to borrow

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GOPALNARAIN
MOSOOMDAR
v.
MUDDOMUTTY
GUPTER.SHOSHES-
RESCONK
MOSOOMDAR
v.
MUDDOMUTTY
GUPTER.MUDDOMUTTY
GUPTER
v.
BAMASOON-
DREY DOSSER.

1874

GOPALNARAIN
MOZOONDAR
v.
MUDDOMUTTY
GUPTER.

SHOSHEN-
BHOONUN
MOZOONDAR

v.
MUDDOMUTTY
GUPTER.

MUDDOMUTTY
GUPTER

v.
BAMASOON-
DERY DOWSE.

these various sums of money on account of the estate, and as manager to execute this security; that his sole power under Hurrynarain's will would not cease as soon as Gopalnarain came of age, but only when Gopalnarain should take upon himself a share in the management of the estate, which he did not do till long after this transaction; and that, at any rate, both Gopalnarain and Ramnarain have ratified all that was done by Gourinarain since they came of age.

Mr. Kennedy's clients, on the other hand, besides denying the facts as put forward by the plaintiff contend that there is no devise at all to the two elder sons, but to all in equal shares; and that Gourinarain, having asked for and obtained a certificate under Act XL of 1858, is bound by the conditions of the certificate under s. 18, which expressly prohibit him from making any sale or mortgage without the sanction of the Court, which sanction in this case was not obtained. They further deny that under any circumstances could the estate of Hurrynarain be made liable for the debts of Lukhinarain. They contend that when Gopalnarain came of age the powers of the manager could not be exercised without his concurrence; and that such powers as Gourinarain had were not properly executed.

Upon the broader features of the defendants' allegations, I have already observed sufficiently. I will now add, that the plaintiff has in my opinion made out a good *prima facie* case that all the sums advanced by her after the death of Hurrynarain, except the Rs. 1,000 which appears to have been applied to the liquidation of a debt of Lukhinarain, and to have been advanced for that purpose, were actually applied to the liquidation of debts due from the estate of Hurrynarain. Whether Hurrynarain died a wealthy man or not, which is quite possible (though the defendants have given us no definite information about it,) it is I think clear that he left considerable claims outstanding against his estate, amounting to about Rs. 80,000; and I think in the absence of all reliable evidence to the contrary I ought to hold that the plaintiff has shown that, with the exception above stated, this mortgage was given in substitution *pro tanto* of other claims secured by valid mortgages upon other portions of the property.

I do not think there is any devise to the two elder sons of Hurrynarain.

Upon the question raised as to the effect of Act XL of 1858, I should be inclined to hold as a general principle that, when a testamentary guardian obtains a certificate under that Act, he puts himself to a certain extent under the control of the Civil Court, and cannot mortgage or sell without its sanction. It is clear from Regulation V of 1799, that it was at one time the opinion in the Courts of the mofussil that no guardian could act at all, without having first obtained the sanction of the Civil Court. That supposition the Regulation expressly negatives, and it prohibits the interference of the Civil Court except upon a regular complaint for breach of trust. But the Act of 1858 repeals so much of this and other Regulations, as restricts the interference of the Civil Court in cases of inheritance by minors; and though it does not render it incumbent on a guardian to apply to the Court for a certificate in all cases, it does contemplate that a testamentary, as well as any other guardian, should do so. And I see no ground, either of inconvenience or inconsistency, for limiting the construction of the very plain general words of s. 18, which restrict every person to whom a certificate has been granted from selling or mortgaging without the order of the Civil Court.

But though I go so far with the argument for the defendant, I do not think it possible to apply this Act to property in Calcutta over which the Courts to which this Act applies have no jurisdiction. In this Court, which alone has jurisdiction over landed property in Calcutta, the relations between incapacitated persons and their guardians, whether testamentary or otherwise, have always been treated from a different point of view to that taken in the mofussil. The notion that a testamentary guardian could not act on behalf of his ward without the sanction of the Court, as far as I am aware, has never prevailed in Calcutta. Nor has it ever been the practice in this Court to obtain that sanction. For the purposes of this case, therefore, I think Act XL of 1858 may be put out of consideration. How it might be applied *in personam* with reference to property in Calcutta in a case arising in the mofussil, I need not consider.

1874

GOPALNARAIN
MOZOOMDAR

v.

MUDDOMUTTY
GUPTER.SHEKHAR-
BHOODUN

MOZOOMDAR

v.

MUDDOMUTTY
GUPTER.MUDDOMUTTY
GUPTER

v.

BAMARDOON-
DEBY DORSEY

1874

GOPALNARAIN
MOHOMDARMUDDOMUTTY
GUPTA.SHOSHUR-
SHOSHUR
MOHOMDARMUDDOMUTTY
GUPTAMUDDOMUTTY
GUPTABAMASOON-
JENY BOWEN.

I concur also in the argument on the part of the defendants that on Gopalnarain's attaining majority, Gourinarain could no longer act under the *anumatipatra* without him. An authority to act given to two persons cannot generally be exercised by one alone. And even if it could be held upon this document that the authority given to any one of the sons who refused to act was revoked, still there would have to be an explicit refusal to act before such a revocation operated, which refusal has not been proved in this case: but, in fact, this document, as it appears to me, does not, provide for any such contingency.

It seems to me, therefore, that the authority which was given by Hurrynarain to the managers of his estate was not properly executed, and that the only result of Gourinarain's signature to that document as "executor of Hurrynarain," by which he doubt he indicates his intention to exercise the authority which he supposed that Hurrynarain had conferred upon him, was to bind his own share of the estate.

There has been very little discussion upon the effect of what is called the will of Lukhinarain. It purports to give some directions as to the management of the testator's property, but it is not very easy to discover what they are. Gourinarain however, as far as I can see, has no authority under it by his own single act to dispose of any portion of that share of the property which was vested in the representatives of Lukhinarain. It seems to me, therefore, that the execution of the mortgage by Gourinarain as "executor of Lukhinarain" was absolutely useless.

It remains to be considered whether upon any of the grounds put forward, the defendants can be made indirectly liable in respect of the mortgage. As the four defendants stand in this respect in a somewhat different position, I will consider the case against each of them separately.

First as to Gopalnarain:—It is, I think, shown by the evidence that he left the entire management of the affairs of the family in the hands of Gourinarain, at least down to the year 1868. That after he came of age he might have taken a share in the management, but did not choose to do so. It is also established to my satisfaction that the money raised

by the mortgage was except as to Rs. 1,000, applied to pay off debts for which the family were jointly liable, and for which portions of the family property had been validly mortgaged; that these debts must have been some how provided for; and, but for this, or some similar arrangement, property of which Gopalnarain is now in the enjoyment, or has had the benefit, would have been lost to the family. Moreover it is admitted by Gopalnarain that he was aware of this mortgage as early as the year 1866. He denies that he was aware of it earlier but I put no faith whatever in his denial and I have no doubt whatever that, at the time it was entered into, he was aware of it. According to his own statement, he was fully aware of his rights when he came of age, and was on the alert to see what was going on. He also admits that, after he came of age his brother generally consulted him. In 1868, he brought his suit against Gourinarain, and as I understand his plaint in which he refers to this transaction, he does not repudiate it, but requires Gourinarain to account for what was done with the money. About a year ago he had a conversation with the plaintiff, and on being asked by her about the mortgage he told her that he knew nothing about it, which meant (as he himself says) that he had nothing to do with it and he referred her to his elder brother. I do not think any one would understand by that, that he was aware of the transaction and that he repudiated it; but rather that he left the whole matter to the management of his elder brother. He has therefore never until this suit was brought repudiated this transaction of which he has all along been enjoying the benefit.

I think under these circumstances, it is too late for Gopalnarain to question this transaction. On this part of the case, no authorities have been cited, nor have I been able to discover any in this Court precisely applicable. It falls however, I think within the general doctrine that a man who stands by and silently allows a transaction to be entered into and takes the benefit of that transaction is in the same position as if he was a party to it.

The case of Ramnarain stands thus :—He is now twenty-four

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GOPALNARAIN
MOZOOMDAR
v.
MUDDONUTTY
GUPTA.
SHANKER-
BHOOSH
MOZOOMDAR
v.
MUDDONUTTY
GUPTA
v.
MUDDONUTTY
GUPTA
v.
RAMASOON-
DENT DOWNS.

1874 or twenty-five years of age. When the mortgage was executed he was under sixteen. I have no doubt that the occasion was one on which, if the will of Hurrynarain had not been in the way, Gourinarain, under his ordinary powers as manager on behalf of an infant member of the family could have created a valid mortgage of Ramnarain's share. But as I have already said the will of Hurrynarain had provided a special mode in which the manager's powers had to be executed which could not be departed from. The case as against him rests upon his acquiescence, to be inferred from his silence after the contract came to his knowledge and his having had the benefit of the transaction. Now I am entirely unable to accept his statement that he first heard of this mortgage at the Registrar's office. That story appears to me utterly incredible. I have no doubt he knew of this transaction much earlier than he admits ; and as he, the only person who can state the truth exactly in this matter, has refused to do so, I must make such inferences as I best can from the usual course of events. Now I take it to be the duty of a member of a Hindu family when he comes of age, at least to make himself generally acquainted with what has been done by the manager during his minority, and to express his dissent at once if he disapproves of any transaction brought to his notice. It seems to me that it would be most unfair to the other members of the family and to those who have dealt with the manager, if it were otherwise. The members of a Hindu family stand in a very close relation to each other, and the normal condition of a Hindu family is that one member should manage on behalf of the rest and it seems to me right to hold that a member of a Hindu family does by his long continued silence ratify the act of the managing member of the family of which he is aware and of which he has had the benefit. I think also I ought to infer that Ramnarain was fully aware shortly after his coming of age, of this transaction : and in my opinion his silence, under these circumstances, there being no fraud or concealment, is equivalent to a ratification.

There are some observations of Holloway, J., in the case of *Peddammuthulaty v. N. Timma Reddy* (1), which would seem to go

the length of laying it down that mere omission to act, or standing by, as it is called, cannot under any circumstance, bar a person from setting up any right which is absolutely vested in him ; Holloway, J., apparently considering that the Statute of Limitation has some bearing on this question. With great respect I am unable to concur in this view. I do not think the bar under the Statute has any thing to do with ratification by acquiescence; and the question is whether from silence acquiescence can be presumed? That will very much depend on whether it was the duty of the person in question to speak out. In this case, I think it was the duty both of Gopalnarain and of Ramnarain to speak out, and, therefore, that from their silence acquiescence may be presumed. Though I do not find any case here precisely in point, I think the decision of Sir John Smart in *Bigg v. Strong* (1), in England, is an authority for this position, and that the principle of that decision is applicable here. That decision was subsequently affirmed by the full Court of Appeal (2).

As against Bamasoondery the case has been left exceedingly bare. The estate of Lukhinarain's family at the date of the mortgage has not been shown, and there is nothing whatever to show whether Bamasoondery was or was not aware of the transaction. As against her, therefore, I have no alternative but to dismiss the suit.

As against the other defendant, Shosheebhoosun, as representing his father Gourinarain who executed the mortgage, it is of course a valid and binding security. He has in my opinion acted honestly in this suit and spoken the truth.

I have only further to mention that a slight doubt as to the plaintiff's case once crossed my mind from the circumstance that no interest had been paid on the mortgage for so long a period, and also from the extraordinary misrecitals of Hurrynarain's the in the mortgage deed. But the first may be explained by will family of the defendants having fallen into dissension; and as to the second, the very high standing and respectability of the attorney who prepared the mortgage is, I think, quite enough

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GOPALNARAIN
MOZOOMDAR
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GUPTER.v.
MUDDOMUTTY
GUPTERv.
BAMASOON-
DERY DOSSAH.

(1) 4 Jur., N. S., 108.

(2) 4 Jur., N. S., 223.

1874

GOPALNARAIN
MOSSOMDAR

v.

MUDDOMUTTY
GUPTA.SHOSHEE-
BHOSUN
MOSSOMDAR

v.

MUDDOMUTTY
GUPTA.MUDDOMUTTY
GUPTA

v.

BRANSON.
JURY DOSSER.

to justify me in presuming that, however strange this may appear there was no sort of fraud in its preparation. Moreover these circumstances were not relied on by the defendants in support of their imputation against Gourinarain. I therefore attach no weight to them, and only mention them lest it may be thought hereafter that they have been overlooked.

The result is that the suit, as against Bamasoondery, will be dismissed with costs. There will be a declaration that the mortgage is a valid security for the sum of Rs. 6,847-3-3, with interest at the rate specified, as against the shares of the defendants Gopalnarain, Ram narain, and Shosheebhoosun, in the property comprised in the mortgage. There will be the usual decree for an account and sale, and for payment of the deficiency, if any (1). There will also be a declaration that, as between the defendant Shosheebhoosun on the one hand and Gopalnarain and Ramnarain on the other, the sum of Rs. 5,847-3-3, with interest thereon, is payable by all these defendants, and the sum of Rs. 1,000, with interest thereon, is payable by Shosheebhoosun alone subject however to any order that may be made in the suit now pending for orders.

Costs on scale No. 2; such costs, other than those payable by the plaintiff to the defendant Bamasoondery, will be added to the defendants. Gopalnarain and Ramnarain will, as between them and Shosheebhoosun, be responsible for the costs so added.

Separate appeals were preferred against this decision. In the first, brought by Gopalnarain and Ramnarain, the plaintiff and Shosheebhoosun were the respondents; while in the second preferred by Shosheebhoosun, who sought to set aside such portion of the decree as relieved Bamasoondery Dossee from all liability, the latter was joined as a respondent with the plaintiff.

Mr. Kennedy and Mr. Bonnerjee for Gopalnarain and Ramnarain, the appellants in the first appeal.

Mr. Branson and Mr. Fugh for the respondent Muddomutty Gupta.

(1) In the decree as drawn up, the liable for the amount of any such deficiency. Gopalnarain, Ramnarain, and Shosheebhoosun were declared

Mr. Lowe and Mr. Fergusson for the respondent Shoahee-
bhooman.

1874

GOBALNARAIN
MOZOOMDAR

v.
MUDDOMUTTY
GUPTER.

SHOSHAB-
SHOOSUN
MOZOOMDAR
v.

MUDDOMUTTY
GUPTER.

MUDDOMUTTY
GUPTER

v.
BAMASUN-
BERT DOHNEY.

Mr. Kennedy (after raising several objections on the score of the improper reception and rejection of evidence by the learned Judge, continued) :— The appellant's case is that the transaction between Gourinarain and the plaintiff was wholly fraudulent. There is a complete absence of proof that the money was required for the estate. The relationship of the mortgagor to the mortgagee, the non-payment of interest, the failure to obtain the sanction of the Court for the mortgage, the omission to comply with the directions contained in Hurrynarain's will, and, so far as the mortgage was for the benefit of Lukhinarain's estate, with the directions of the latter's will are all strong evidence of *mala fides*. Markby, J. erred in holding that Act XI of 1858 does not restrict the powers of a mofussil guardian with respect to property in Calcutta. The mortgage was executed by Gourinarain as executor of Hurrynarain and not as *kurta*. [COUCH, C.J.,—The learned Judge held that though the mortgage was not executed according to the will, the appellant stood by and took the benefit of the transaction. PONTIFEX, J.—Acquiescence before the act complained of would bind the appellants; subsequent acquiescence would not unless accompanied by ratification.] The family took the property not in the ordinary way as a joint Hindu family but under the will, and the manager had no greater powers than were given by the will. The case falls within the general rule that when a person professing to act in a certain capacity, exceeds his powers his act will not affect the interests of third persons, though it may be conclusive as against himself. Acquiescence imports full knowledge—*Life Association of Scotland v. Siddal* (1). [COUCH, C.J.,—No doubt, see *Bhooban Mohan Bannerjee v. Elliott* (2) PONTIFEX, J., referred to the India Contract Act (IX. of 1872), s. 198.] The mere omission to assert a right does not amount to a bar so long as the right is not barred by the law of limitation—*Archbold v. Scully* (3), in which Lord Wensleydale draws a

(1) 3 D. G. F. & J., 58; see p. 74.

(2) 6 B. L. R., 85; *affd.* in P. O., 12 B. L. R., 408.

(3) 9 H. L., 360. see p. 383.

1874 distinction between mere laches and acquiescence whereby another is induced to alter his position. The same doctrine is laid down in *Peddammuthulaty v. N. Timma Reddy* (1) from which decision Markby, J., dissents; see also *Dann v Spurrier* (2). The learned Judge relied on *Bigg v. Strong* (3), but the circumstances of that case were very peculiar, and wholly unlike the facts here. There is not the slightest evidence that either of the appellants ever ratified the act. There is no authority for the position that a member of a joint Hindu family is bound to make himself acquainted with the state of the joint affair so soon as he comes of age. In *Ranganmani Dasi, v. Kasinath Dutt* (4), Markby, J., held that the manager of a joint Hindu family is not bound to render an account to the other members of his family, but his decision was subsequently overruled by a Full Bench in *Abhaychandra Chowdhry v. Pyari Mohan Guha* (5). There was nothing to put the appellants on enquiry, no interest having been paid for a long time.

GOPALNARAIN
MOZOOMDAR
v.
MUDDOMUTTY
GUPTEE.
—
SHOSHEN-
BHOSUN
MOZOOMDAR
v.
MUDDOMUTTY
GUPTEE.
—
MUDDOMUTTY
GUPTEE
v.
BARABOON-
DARY DORSEN.

Mr. Bonnerjee on the same side contended that inasmuch as the appellants had never covenanted to pay the debt, they could not be made personally liable for any deficiency which might arise on the sale. And on the subject of acquiescence he referred to *Strange v. Fooks* (6) and *Lloyd v. Attwood* (7).

Mr. Pugh for Muddomutty Guptee—Hurrynarain's will creates no new estate: it simply provides for the management of the property: the will clearly shows that he intended that the property should remain joint until his youngest son attained majority. Gourinarain was the *de facto* manager when the mortgage was executed, and Markby, J., expressly finds that there is no proof of fraud. [PONTIFEX, J.—You admit that a portion of the money was borrowed to pay a debt due by Lukhinarain; that fact should have put you on enquiry. Again the mortgage was executed seventeen years after Hurrynarain's death and although that may not shift

(1) 2 Mad. H. C. Rep., 270.

(4) 3 B. L. R., O. C., 1

(2) 7 Ves., 231.

(5) 5 B. L. R., 347.

(3) 4 Jur. N. S., 108; affd. on appeal,

(6) 4 Gif., 408.

ib., 983

(7) 3 De G. & J., 614.

the burden of proof; it raises a presumption against the *bona fides* of the transaction.] A *prima facie* case of necessity was proved when it was shown that suits were threatened. There are entries by Gourinarain in the family account-books which also go to prove that the money was needed. If necessity be shown, the estate is liable in whatever way the *de facto* manager may have described himself.—*Hanoemanpersaud Panday v. Mussamat Babooe Munraj Keonwerse*. (1). As to whether the appellant's conduct amounted to acquiescence, see the dictum of Turner, L.J., in *Bigg v. Strong* (2), that absence of dissent creates a presumption of assent; and *Wentworth v. Lloyd* (3), in which Sir John Romilly, M.R., after stating that it lay on the defendants to prove distinct information to the plaintiff, and acquiescence by him after such information given, observes, that when a matter is contested six years after the event has occurred, where much material evidence may have been lost, the defendants are entitled to every fair and reasonable presumption that may be drawn in favor of the direct testimony they produce. *Archbold v. Scully* (4) turned on the question of statutory limitation, and the other decisions on the subject of acquiescence cited for the appellants rested on the peculiar circumstances of each case.

Markby, J., was wrong in dismissing the suit against Barnaseondery. [COUCH, C. J.—She is not an appellant in this appeal, and you have not appealed as against her; you cannot, therefore, raise that point.] Under s. 348, Act VIII of 1859, notice of a cross objection must, no doubt, be given—*In re Madhobee Dessee* (5); but we now ask the Court to modify the decree under s. 337, which gives such power to the Appellate Court when there are two or more defendants to a suit and the decision of the lower Court proceeds on a ground common to all of them. [COUCH, C. J.—The section means that the Appellate Court shall have power to modify the decree in favor of the appellants, whether plaintiffs or defendants, and not in favor of the respondents.] Under s. 348 the Appellate Court has power, on cross appeal, to re-open

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GOPALNARAIN
MOZOOMDAR
v.
MUDDOMUTTY
GUPTER.
SHOSHNE-
BHOORUN
MOZOOMDAR
v.
MUDDOMUTTY
GUPTER.
MUDDOMUTTY
GUPTER
v.
BARNASEON-
DERY DESSEE.

(1) 6 Moore's I. A., 393.

(2) 4 Jur. N. S., 983.

(4) 32 Beav., 467.

(4) 9 H. L. Ca., 360.

(5) 6 W. R., 102.

1874 the whole case, and assess damages on defendants who had been acquitted in the original suit, and who were not parties to the appeal—*Anund Chunder Goopto v. Mohesh Chunder Mozoomdar* (1). [PONTIFEX, J.—There cannot be a cross appeal except against a person appealing. Mr. Kennedy referred to *Hossin Bulsh Patooah v. Shaikh Baroo Reparee* (2),]

GOPALNARAIN
MOZOOMDAR
v.
MUDDOMUTTY
GUPTA,
SHOSHEE-
BHOOSUN
MOZOOMDAR
v.
MUDDOMUTTY
GUPTA,
MUDDOMUTTY
GUPTA
v.
BAMASOON-
DEET DOSSER.

The learned Counsel then applied for leave to file an appeal against the decree so far as it dismissed the suit as against Bamasondery, such appeal to be heard with the appeal of Shosheebhoosun; and on the suggestion of the Court, subsequently renewed the application, after notice to Bamasondery. The Court, after hearing Mr. Kennedy on her behalf, granted leave to appeal.

Mr. Branson on the same side.

Mr. Kennedy in reply.—Hurrynarain's will limited the power which Gourinarain would otherwise have possessed as *kurta*. [PONTIFEX, J.—If a will appointing three executors were to provide that all three must join in any conveyance of the property, would that limit the common law power of one executor to convey? That is a similar case, except that the powers of a *kurta* are greater than those of an executor: moreover, as Mr. Pugh pointed out, the testator intended the property to continue joint until the youngest son should come of age.] In *Brown v. Bamford* (3), when the testator gave his daughters a power of appointment coupled, however, with a restraint on anticipation, Lord Lyndhurst reversing the decision of Sir L. Shadwell, held that the lady's power was limited by the restriction. [COUCH, C.J.—Even if the mortgage was not executed in accordance with the directions of the will, if the debts were really due from the Hurrynarain's estate, and the transaction was a *bonâ fide* one, there would be a valid charge. PONTIFEX, J.—The direction as to executing in the names of the minors was of no effect. No one can execute a deed in the name of a minor, since the minor himself is incompetent to

(1) 1 W. R., 239.

(2) 5 W. R., 50.

(3) 11 Sim., 127; revd. on app.
1 Phill., 620.

make a deed.] A *kurta* cannot mortgage or sell the joint immove-
 able estate alone, if there be another member of the joint family
 present, who is not laboring under any disability—Colebrooke's
 Dig. Bk. ii, Ch. iv, v. 55; and Shamachurn Sircar's Vyavastha
 Darpana, vyavastha 354.

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GOPALNARAIN
MOZOOMDAR
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GUPTEE.SHOSHEE-
BHOOSUN
MOZOOMDAR
v.MUDDOMUTTY
GUPTEE.MUDDOMUTTY
GUPTEE
v.BAMASOON-
DERY DOSSEE.

The mortgage was given to secure advances to pay off debts, one of such debts being due from Lukhinarain's estate, and of the remainder all, except one of Rs. 100, were barred by the law of limitation, and Gourinarain's acknowledgment could not revive them except as against himself—Act XIV of 1859, s. 4. [Mr. Pugh.—This point has never been raised before. COUCH, C.J.—No, it is entirely new; it was not even raised in the grounds of appeal.] The Court is bound to take notice of the Statute if it appear either on the pleadings or upon the facts proved at the trial. The point is at least material as showing how far the transaction was *bonâ fide*. The decree charges the whole of the appellants' shares, whereas only a portion of the property was mortgaged. [Mr. Pugh.—That is under the covenant of the *kurta*. COUCH, C. J.—Can the *kurta* bind the estate by his covenant? PONTIFEX J.—The mortgagee's proper remedy on the mortgage is by foreclosure; although a sale is as a rule allowed, the mortgagee has no right to it; and upon foreclosure the remedy on the covenant is gone.] The learned Judge was wrong in saddling the appellants with the entire costs.

The Court reserved judgment till after the hearing of the other appeals.

Mr. Wood and Mr. Lowc for Shosheebhoosun, the appellant in the second appeal.

Mr. Pugh and Mr. Branson for Muddomutty Guptee, one of the respondents in the second, and appellant in the third, appeal.

Mr. Kennedy and Mr. Bonnerjee for Bamasoondery Dossee, one of the respondents in the second, and respondent in the third, appeal.

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GOPALNARAIN
MOZOOMDARv,
MUDDOMUTTY
GUPTEE.SHOSHEE-
BHOOSUN
MOZOOMDAR
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GUPTEE.MUDDOMUTTY
GUPTEEv,
BAMASOON-
DERY DOWSE.

Mr. Wood contended that the question of limitation could not be raised at this stage of the proceedings.

Mr. Lowe on the same side.—Under Act XIV of 1859, an acknowledgment to take a debt out of the operation of the Act need not have been made before the debt was barred. There is a difference in this respect between the wording of s. 4 of Act XIV of 1859 and s. 20 of Act IX of 1871. The learned Counsel also referred to Martin's Lord Tenterden's Act p. 3; Byles on Bills, p. 338; *Williamson v. Naylor* (1); and *Philips v. Philips* (2).

Mr. Pugh for Muddomutty Guptee.—The question of limitation did not arise on the proceedings in such a way as bound the Court to take notice of it. And the point not having been raised till the last moment on appeal, every presumption ought to be made in favor of the mortgagee, and at all events it should not be presumed that the debts were barred. The Statute only bars the remedy, it does not extinguish the right—*Doe d. Kullamal v. Kuppu Pillai* (3). [COUCH, C.J.—That is as to realty only.] No demand for payment was proved to have been made; in *Brammayi Dasi v. Abhai Charan Chowdhry* (4); Norman, J., held that until demand made, time will not run against a Hindu creditor. [COUCH, C.J.—That was an action for money lent. The decision is difficult to understand; it seems to be founded on an opinion that the contract was somewhat in the nature of a contract to pay an annuity.] When Act XIV of 1859 was passed, the doctrine of English law was that an acknowledgment after a debt is barred would revive it, and the Act contains no words to show that the Indian Legislature intended to introduce a different doctrine. An executor may bind his testator's estate by his admission—*Ohunder Kant Mitter v. Ramnarain Dey Sircar* (5). It is clear from the evidence that Gourinarain was managing for Bamasoondery as well as for the other members of the family. Her position in no wise differs from theirs. Her share was released to the extent of the Rs. 1,000, which was paid for

(1) 3 Y. & C., 208.

(4) 7 B. L. B., 489.

(2) 3 Hare 281; see p. 299.

(5) 8 W. B., 63.

(3) 1 Mad. H. C. Rep., 85.

Lukhinarain's debt. As to whether a decree for sale is a proper remedy, it is submitted that this Court has the same power of directing a sale under s. 27, Act VI of 1854, as the Court of Chancery has under 15 & 16 Vict., c. 86, s. 48. [PONTIFEX, J.—Mr. Kennedy does not dispute the validity of the decree for sale, but contends that his clients should not be made liable for any deficiency and for the costs. Only two houses were mortgaged, and yet you claim a charge over the whole estate. You rely on the mortgage to save these debts from the operation of the law of limitation; but is there then any debt alive except as against these two houses?] It is submitted there is by virtue of the covenant. At the time of the mortgage there were reasonable grounds for believing that the transaction was for the benefit of the estate: that is all the mortgage need show—*Lalla Bunsseedhur v. Koonwur Bindeseree Dutt Singh* (1). The defendants by their conduct recognized the validity of the mortgage, and cannot now dispute it—*Chetty Colum Comara Vencatachella Reddyer v. Raja Rungasawmy Streemunth Jyengar Bahadoor* (2).

Mr. Kennedy for Bamasoondery Dossee.—It is unnecessary to prove a demand in order to bring a debt within the operation of Act XIV of 1859—*Jeanisa Ladli Begam Saheb v. Manikji Kharsetji* (3). The point of limitation must be decided at whatever stage of a cause it be raised—*Davlata Bhujanga v. Beru Yadoji* (4); though this Court does make a distinction in cases of special appeal. Under s. 4, Act XIV of 1859, an acknowledgment by an agent is not sufficient—*Parshotam Manchharam v. Mirza Abdul Latif Khan* (5), and a *kurta* has no higher position than an agent.

Mr. Wood in reply in the second appeal.

Mr. Pugh in reply in the third appeal.

Cur. adv. vult.

The judgment of the Court was delivered by

COUCH, C.J.—These were appeals from a decision of Markby J., in a suit brought by Sreemutty Muddomutty Guptee against

(1) 10 Moore's I. A., 454.

(2) 8 Moore's I. A., 319.

(3) 7 Bom., H. C. Rep., O. C., 36.

(4) 4 Bom. H. C. Rep., A. C., 197.

(5) 6 Bom. H. C. Rep., O. C., 67.

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- 1874 Gopalnarain Mozoomdar, the appellant in the first of the appeals, and three others.
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- By the decree made by Markby, J., it was ordered and decreed that the suit should be dismissed as against the defendant Bamasoondery Dossee with costs; and it was declared that the indenture of mortgage, dated the 24th of March 1865, is a valid security for the sum of Rs. 6,847-3-3, with interest thereon at the rate of twelve per cent. per annum from the 4th day of February 1865, as against the shares of the defendants Gopalnarain Mozoomdar, Ramnarain Mozoomdar, and Shosheebhoosun Mozoomdar, in the property comprised in the said mortgage; and it was ordered that it should be referred to the Taxing Officer to tax the costs of the suit; and upon the three defendants, Gopalnarain Mozoomdar, Ramnarain Mozoomdar, and Shosheebhoosun Mozoomdar, or any or either of them, paying to the plaintiff the said sum of Rs. 6,847-3-3, with interest thereon at the rate and from the time aforesaid, and her costs, other than the costs payable to the defendant Bamasoondery Dossee, with interest thereon, it was ordered that the plaintiff should reconvey the premises comprised in the mortgage to the defendants, or such of them as should pay such principal interest, and costs; and in default of their paying the money at the time appointed, it was ordered and decreed that their shares in the mortgaged premises should be sold, with the directions usual upon such sales; and that, if the money to arise by such sale should not be sufficient to pay the said principal, interest, and costs, with interest thereon in full, the three defendants, Gopalnarain Mozoomdar, Ramnarain Mozoomdar, and Shosheebhoosun Mozoomdar, should pay to the plaintiff the amount of the deficiency; and it was declared that, as between the defendant Shosheebhoosun Mozoomdar on the one part and the defendants Gopalnarain Mozoomdar and Ramnarain Mozoomdar on the other part, the said sum of Rs. 6,847-3-3, with interest, was payable as follows, that is Rs. 5,847-3-3, with interest, was payable by all those three defendants, and Rs. 1,000 with interest was payable by the defendant Shosheebhoosun Mozoomdar alone, and subject to any order that may be made in the suit No. 351 of 1868, which was a suit for partition.

(The learned Chief Justice, after stating the substance of the pleadings and the issues, continued):—

Although the plaint stated, as the fact is, that the mortgage purported to be made by Gourinarain Mozoomdar as executor, yet the substantial question was whether this mortgage did create a valid charge upon the property which was professed to be mortgage.d The statement in the deed that it was made by Gourinarain as executor, and the allegation in the plaint, were not material to the substance of the claim; and this issue,— was the mortgage deed so executed as to constitute a valid and binding charge against the defendants or either of them?— raised the real question. The case is similar in this respect to *Arbuthnot v. Betts* (1), in which case the decision of this Court has been affirmed by the Judicial Committee of the Privy Council. There the plaintiffs brought a suit for the recovery of damages for a breach of contract. They alleged that the defendant Mr. Betts, for himself and his partners, entered into a contract with them for the purchase of 1,012 maunds of indigo, and that they were ready to deliver the seed, but the defendants refused to take delivery. The defence was that the defendants had given an order to the plaintiffs for the purchase of 1,000 maunds of fresh and superior kind of seed, and that the plaintiff had purchased seed of an inferior sort, and the defendants had, on inspection, refused to take the seed. The District Judge framed an issue of a somewhat technical character, namely, “whether as two of the plaintiffs have stated that they acted as agents for the defendants in the purchase of indigo seed, the suit can proceed in its present form or not?” And he held that the plaintiffs were bound to prove the case which they had stated in the plaint, and that their denial of the existence of the relation of vendor and purchaser between themselves and the defendants was fatal to their claim. Upon an appeal to this Court, there being amongst the issues which had been framed by the Judge, one (the 3rd)—“what were the exact terms of the contract entered into between the plaintiffs and the defendants?” and another (the 4th) “have the plaintiffs fulfilled their part of the said contract?”—we were of opinion that the substance of the case ought

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1874 to be looked at, and that, if it had been necessary, the Judge ought to have amended the issues so as to raise the real question in controversy between the parties; but, in fact, no amendment was necessary, and we heard the case on the merits, and gave a decree for the plaintiffs on the ground that the case ought to be treated as one in which they sued to recover money due to them as agents, they having supplied seed to the defendants according to the order which was given to them to execute. This decree was affirmed on appeal by the Judicial Committee. The case shows that what is to be looked at is, not the precise form of the plaint, but what is the real question in the case; or, to use the language of the Judicial Committee in *Hnnoomanpersaud Panday v. Mussamut Babooee Munraj Koonwerree* (1), "the substance and merits of the case are to be kept constantly in view; the substance, and not the mere literal wording of the issues, is to be regarded."

The question, then, which we have to determine is, was this mortgage a valid charge upon the property? The debts of Hurrynarain Mozoomdar were by the Hindu law a charge upon his estate in the hands of the person to whom the estate came upon his death. It is not necessary to refer to any authority for this? it is a well known rule of Hindu law. And whether Hurrynarain Mozoomdar made a will, and in that gave any direction or power to sell or mortgage his property for payment of his debts, the sons to whom the estate came on his death,—or, if the family was in such a state that there was a manager for the joint family, the manager,—could mortgage or sell the property. The law gave him authority to do so for the payment of the debts. The sons appear to have continued, and it appears to have been the intention of the testator Hurrynarain Mozoomdar, that they should for a time continue, to be a joint family. There had been no separation before the mortgage was made—no separation in estate. Gopalnarain had attained his majority, but nothing appears to have been done to effect a separation in estate in consequence of it. That it was the intention of the testator that the family should continue for a time joint appears

(1) 6 Moore's L. A., 393; at p. 411.

from the direction contained in the will that the two minor sons and the widow were to be maintained out of the joint estate, and also from the direction that the marriage expenses of any of the sons were to be paid out of that estate. We think we must treat this family as continuing to be a joint family, so that the son who was acting as a manager for it, and was indicated by the deceased as the person who should manage, had the authority which is given by the Hindu law to sell or mortgage the property in order to pay off debts due by the deceased. That being so, this clause in the will has no operation as a trust or as a charge upon the property. It did nothing which the law had not already done, and which it would not do if there had been no such clause in the will. It is like the case in the English law of a trust or a charge by will upon personal estate for the payment of debts, the personal estate being vested in the executor or administrator as a fund for the payment of debts. This has been decided by the House of Lords in *Scott v. Jones* (1), in which the judgment of Sir John Leach was affirmed, and the judgment of Lord Brougham reversed. And in two cases subsequently decided, *Freak v. Cranefeldt* (2), and *Evans v. Tweedy* (3), the doctrine has been acted upon. It appears to us that the case of the Hindu family with the power—and not only the power, but the obligation—to pay the debts by means of the property left by the deceased, is precisely analogous to this case.

The eldest son, or the manager of the family, having power to raise money to pay the debts and to make the mortgage, can it be said that the charge which he made under the power which he possessed by the Hindu law is invalid, because he professed to do it as executor and by virtue of the power in the will, and not by virtue of his general power? Having the power to do it, we think that although the mortgage was not executed strictly in accordance with the clause in the will, still it can be supported, and should be supported, as having been done by virtue of the power conferred on him by law independently of

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(1) 4 Cl. & Fin., 382.

(2) 3 Myl. & C., 499.

(3) 1 Beav., 55.

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the will, and that the parties interested in the property cannot be allowed to say that it should be treated as a void charge although the amount raised by the mortgage may have been properly applied, and that their shares in the estate are to be freed from liability. I shall come presently to the question of the validity of the mortgage, with reference to the purposes for which it was made. At present, I am speaking of the form in which it was made, and the power which the mortgagor professed to exercise.

Another question, which is important in this case, is with reference to the operation of the law of limitation. For the same reason as makes the form of the mortgage immaterial,—that this clause in the will had not any legal operation as a trust or a charge,—it does not prevent the operation of the law of limitation. A trust or a charge in a will, if it takes effect and has a legal operation, would do so; but this simply had no effect, and according to the case to which I have referred, it would not prevent the operation of the law of limitation.

Taking these two matters as settled,—that the form of the mortgage, and its not being executed strictly in accordance with the will, does not affect its validity, and that the law of limitation might apply to the debts for which the mortgage was given as a security,—we have to consider whether this was a mortgage of such a description as would be a valid charge upon the property. Now the general rule is—and I here adopt the language of the Judicial Committee of the Privy Council in *Chetty Colum Comora Vencatachella Reddyer v. Rajah Rungasawmy Streemunth Jyengar Bahadoor* (1)—that the money must be advanced to pay subsisting charges on the estate or otherwise for its advantage.

There are cases in which a mortgage may be established, although the money may not have been actually so applied, but these are cases in which the person advancing the money, the mortgagee, has acted *bond fide*, and, after making due enquiry, has believed that this was the purpose of the mortgage.

We have then to see what part of the money for which the mortgage was made as a security was a subsisting charge on the property of the deceased, or was advanced to pay off a subsist-

(1) 8 Moore's L. A., 319; at p. 323.

ing charge. We agree with Markby, J.; that the charge of fraud against the plaintiff has not been proved. It is not necessary to go particularly into that matter. Upon the evidence, the proof of that charge certainly failed, and this will be important upon the question of costs when I come to speak of that.

There were some objections taken on behalf of the appellants Gopalnaraïn and Ramnaraïn, which had better now be disposed of. It was objected that evidence had been improperly rejected by the learned Judge. It was said that a witness, Mohesh Chunder Banerjee, had not been allowed to depose to a fact which was stated in a memorandum produced by him, because he said he had no independent recollection of the matter. It appears to us, that the learned Judge was wrong there.

There was another objection; that an entry by Grish Chunder Banerjee as to business done in the office of the attorney connected with the preparation of the mortgage deed, was rejected. The object of this evidence appears to have been to show that Gourinaraïn, the mortgagor, gave the instructions for the preparation of the mortgage, and, in fact, acted as the real party in the matter,—acted on behalf of the plaintiff, the mortgagee, as well as on his own account,—and from this the Court would have been asked to infer that he was, as the defendants alleged, the real party, and that the name of the plaintiff was only put forward for him. Looking at what this evidence which was rejected would prove, namely, that he did give instructions for the deed, he being the son-in-law of the plaintiff, we do not think that the inference should be drawn which the defendants ask to have drawn. And it appears to us that, if this evidence had been received, it would not have varied the decision of the Court on the question of fraud. If that evidence had been admitted there would not have been evidence that the Court could come to the conclusion upon that the charge of fraud was proved. Therefore not only under s. 167 of the Evidence Act, but according to the well known rule which would be acted upon without any such provision in the Evidence Act, this would not be a ground for our reversing the decision of Markby, J.

It was said that not only do the instructions for the mortgage

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to which I have referred, show fraud, but that the recitals in the deed were untrue. There is some foundation for saying this ; but we do not think much importance should be given to those erroneous recitals, or to the non-payment of interest, which was also relied upon ; because the interest was, in fact, paid for some time, and it is not unlikely that the dissensions which arose in the family would put a stop to the payment of the interest. The great fact in support of the *bona fides* of the mortgage transaction on the part of the plaintiff is, that before the preparation of the English mortgage to which the instructions given by Gourinarain apply, there was the Bengali mortgage of the 4th of February 1865, and it appears from evidence, of the trustworthiness of which there does not appear to be any reasonable doubt, that the plaintiff's son had advised her not to advance any more money without getting a mortgage.

Another objection was taken to the evidence in the case, namely, to the admission of a copy of an *ikrar*. As to this, it does not appear to us that the evidence was of any consequence, and, therefore, that the admission of the copy instead of the original *ikrar* is an objection which an Appellate Court ought not to give effect to.

Another objection was that certain entries had been tendered by the defendants, and were rejected by the learned Judge. According to the rules and practice of this Court, the learned Judge was not bound to allow these entries to be used in evidence, and we cannot say that he was wrong. It appeared subsequently on the hearing of the cross appeal, that the appellant Gopalnarain was not then prepared with translations of these entries. What he seems to have wished for was to have a kind of roving inquiry amongst the books in order to find out if there was anything in them which would be of use to him. That cannot be allowed at the hearing of the suit. The entries which were sought to be used ought to have been translated that the Court might peruse them. Great inconvenience would follow from any other course being adopted.

Having disposed of these minor objections, we come to consider whether any of the debts intended to be secured by the mortgage were at that time barred by the law of limitation.

This objection arises on the plaintiff's case; it is not an objection which the defendants had to take in their written statements, or by way of defence to the suit. The onus was on the plaintiff to prove that the mortgage was a valid one: and if it appeared upon evidence that some of the debts were barred, the case would not come within the requirement that the mortgage should be made to pay off a subsisting charge upon the estate.

It was argued that there was an acknowledgment of a debt by Gourinarain which was sufficient to prevent the operation of the law of limitation. But the manager of a joint Hindu family has no power to revive a debt by an acknowledgment, except as against himself. I am speaking of what the law was at the time of this transaction, s. 4 of Act XIV of 1859 being then applicable. It would not, we think, be right to apply in India the decisions of the English Courts as to executors in England being at liberty not to avail themselves of the law of limitation; because those decisions probably rest upon the peculiar position of an executor in England, and the rights which he may have from his having been considered originally to be the representative of the Ordinary, and to have entire power over the estate. They would not be a safe guide in this country, where amongst Hindus an executor really is not recognized. The probate of a will by a Hindu does not have the same effect as probate of a will in England, nor does the calling the man to whom the property is left executor put him in exactly the same position as an English executor. We, therefore, cannot apply those cases here, and there is no ground here for saying that any acknowledgment of Gourinarain would prevent the operation of the law of limitation.

It appears when we look into the evidence relating to the different sums for which the mortgage was given as a security, that only one debt, of Rs. 100 was not, at the time of the mortgage, barred by the law of limitation. All the other debts were of a date which made the law of limitation applicable. This debt of Rs. 100 appears to be satisfactorily proved. The plaintiff's evidence about it is corroborated by entries in the books which have been produced. There is an entry on one

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1874 side at page 79, and the corresponding debt entry is given at page 78, of the additional paper book. It also appears that Rs 947-3-3 were advanced to Gourinarain at the time of the mortgage. The evidence to prove this, besides the plaintiff's evidence, is the recital in the Bengali mortgage, where the manner in which the money was advanced is stated, namely, by two Government promissory notes of which the dates and amounts are given, and they are valued. Then there was put in evidence a receipt for these very notes showing that they were applied for the benefit of the estate of Hurrynarain Mozoomdar, and there is the evidence of Baneemadhub Bhattacharjee to the same effect. This, we think, sufficiently shows that this sum of Rs. 947-3-3 was really advanced to Gourinarain at the time of the mortgage was made, and that it was applied in such a way, that it would be a proper subject for a mortgage of the property of the deceased Hurrynarain. Therefore, the result of an examination into the case is that the mortgage is valid for these two sums of Rs. 100 and Rs 947-3-3. It is a valid mortgage of the four shares of the whole of the property which is comprised in it.

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This leads us to the grounds of the plaintiff's appeal. The learned Judge, as it appeared when I read the decree, dismissed the suit against Bamasoondery Dossee, the owner of one share of the property. In the principle appeal, namely, that of Gopalnarain and Ramnarain against the plaintiff, she was unable to take this objection, and we allowed her to bring an appeal making Bamasoondery Dossee a respondent. It follows from what I have already stated that the plaintiff must succeed in this, and that the decree instead of being, as it is, a decree dismissing the suit against Bamasoondery Dossee, ought to be a decree establishing the mortgage, for the two sums I have mentioned, against her share of the property, as well as the shares of the other three defendants.

There is another question as to the Rs. 1,000 which was borrowed, and applied for the discharge, not of the debts due by Hurrynarain or for which his estate was liable, but for the debts of Lukhinarain. As to that sum the mortgage cannot be good. Gourinarain was not in a position to make a valid mortgage

of the share of Lukhinarain separately from the shares of the others. The power which he had as manager, of the family to make a mortgage of the shares of the whole would not extend to his making a mortgage of Lukhinarain's share to pay off the liabilities of Lukhinarain. The Rs. 1,000 appear to have been applied for the benefit of the estate of Lukhinarain. Shosheebhoosun Mozoomdar, who is the representative of Gourinarain, will be liable to pay that sum to the plaintiff, but will be entitled to claim it out of the estate of Lukhinarain. The person liable to the plaintiff is the representative of Gourinarain, the person who is possessed of his estate. Although the mortgage did not operate upon the four shares beyond the two sums I have mentioned, namely, Rs. 1,000 and Rs. 947-3-3 as against Gourinarain, who executed it, it was a good mortgage for the whole amount which was borrowed, or acknowledged to be due, by him; and the share of Gourinarain is liable for the whole Rs. 6,847-3-3: Shosheebhoosun Mozoomdar, as representing him, and to the extent of the property of Gourinarain which he is possessed of, is also liable for it.

But the decree made by MARKBY, J., provides that the three defendants, whose shares he held to be properly mortgaged, were to pay any deficiency arising after the sale. Now with respect to Gopalnarain, and Ramnarain, and Lukhinarain, all the authority or power which Gourinarain had was to mortgage their shares of the property. He had no power as manager of the joint family to pledge their personal credit, and to make them personally responsible for the money which he was borrowing. The direction to pay the deficiency, resting upon the pledge of their personal credit or on the agreement binding them personally, cannot be supported. And that part of the decree must be omitted.

Therefore the decree we propose to make in order to carry out what in our opinion, is the right determination of the questions between the parties, is this. We declare that the mortgage of the 24th March 1865 is a valid and effectual mortgage with respect to the whole of the property comprised therein, for the principal sum of Rs. 1,047-3-3 only, representing the sum of Rs. 100 and Rs. 947-3-3. We declare that the said mortgage is a valid and effectual mortgage with respect to the one-fourth

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share of Gourinarain Mozoomdar, and on the whole of the property comprised in such mortgage, for the whole of the principal monies purporting to be secured thereby. We direct an account to be taken of what is due for principal and interest in respect of the Rs. 1,047-3-3 ; and in the event of none of the parties interested in the equity of redemption paying off such amount, to be certified within six months from the date of this decree with interest up to payment, the property is to be sold, with the usual consequential directions. In case of payment, the plaintiff is to reconvey according to the rights of the parties for which purpose all parties are to be at liberty to apply to the Court. This direction will only operate as regards Gourinarain's share in the event of his paying the whole amount which is due. If Rs. 1,047-3-3, and the interest upon it only should be paid, then the plaintiff will only be bound to reconvey the other three persons their shares, because Gourinarain's share will remain liable until the whole of the sum is paid off. We declare that as between the owners of the equity of redemption, the share of each, except that of Shosheebhoosun, is only liable to provide for a proportionate part of the sums to be paid for redemption. Take an account of what is due for principal and interest in respect of the entire amount purporting to be secured by the mortgage, and in the event of such amount not being paid off by Shosheebhoosun, or any other person, sell the one-fourth share of Gourinarain, and declare that the share of Gourinarain is in the first instance liable to pay the Rs. 1,000 which was advanced on behalf of the estate of Lukhinarain, but without prejudice to the right of Shosheebhoosun to prove or claim against the share of Lukhinarain for the amount of principal and interest which he shall have paid to the mortgagees in respect of such sum.

To sum it up,—if Rs. 1,047-3-3 only should be paid, then the three sharers other than Gourinarain, or Shosheebhoosun representing Gourinarain will be entitled to have their shares reconveyed to them ; and as between themselves each of them will be declared to be only liable to one-fourth of that sum. Gourinarain's share is subject to the whole sum secured by the mortgage, and is liable to be sold if the whole of that sum is not paid off.

It only remains to be determined what should be done as to the costs of the suit. It is true that the plaintiff has only partially succeeded in the suit. As to three of the defendants, the mortgage has been established for only a comparatively small part of sum which the plaintiff claimed: but in considering whether, on that account, we ought to deprive her of any part of the costs of the suit, we must take into consideration that these three defendants made charges of fraud against her which they have failed to establish. Looking at that fact, it seems proper that all the defendants should be made to pay the costs of the suit in the original Court, and we shall direct this to be done. As to the costs of the appeals, there has been a partial success in the appeal by Gopalnarain. He has succeeded in reversing the decree of the learned Judge as to a considerable part of the claim against some of the defendants; but he has succeeded in that by an objection which was taken for the first time in this Court. The objection that the debts were barred by the law of limitation was in fact not taken until the learned Counsel for the appellant was replying. A success of that kind does not entitle Gopalnarain to the costs of the appeal.

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In the appeal of Shosheebhoosun he has been only partially successful. He has succeeded as to Bamasoondery; but he put forward a claim in respect of the Rs. 1,000 in which he has not succeeded. It seems to us proper that in that appeal no costs should be given.

The appeal by the plaintiff against Bamasoondery has been successful: but considering that it was not brought forward until the last moment, and looking at the nature of case, it appears to us that it would not be right to allow the costs of that appeal.

The parties in all three appeals will bear their own costs of the appeals on scale No. 2.

Decree varied.

Attorneys for Muddomutty Guptee: Messrs. Swinhoe, Law, and Co.

Attorneys for Gopalnarain and Ramnarain Mozoomdar and Bamasoondery Dossee: Messrs. Judge and Gangooly.

Attorney for Shosheebhoosun Mozoomdar: Baboo Grish Chunder Ghose.

APPELLATE CRIMINAL,

Before Mr. Justice Kemp and Mr. Justice Birch.

THE QUEEN v. MUSSAMUT ITWARYA.*

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May 9.

Evidence of Child, Admissibility of—Competent Witness—New Trial—Act X of 1873 (Oaths Act) ss. 5, 13—Evidence Act (Act I of 1872), s. 113—Criminal Procedure Code (Act X of 1872), Chap. XV.

The accused was charged with throwing *B* and *C* down a well. She was charged with the murder of *B* under s. 302 of the Penal Code, and on that charge she was tried and acquitted. Thereupon the Joint Magistrate, without holding any further preliminary enquiry, committed her on a charge under s. 307 of attempting to murder *C*. The only eye-witness of the offence, according to the Sessions Judge, was a child, and as she did not understand the nature of an oath or solemn affirmation, her evidence was taken on simple affirmation. The Jury found the prisoner guilty, and she was sentenced to ten years' transportation. *Held*, that the omission to administer either an oath or solemn affirmation, although knowingly made, did not render the child's evidence inadmissible. *Held* also that the omission by the Joint Magistrate to hold a preliminary enquiry on the charge under s. 307 being an irregularity which prejudiced the prisoner in her defence, the proceedings should be quashed, and a new trial held.

THE accused was charged with throwing two children into a well, one a girl, aged about nine, and the other a boy, about two and a half years of age, on the 31st December 1873. The prisoner was committed to the Sessions on the charge of the murder of the boy, and on the 6th February 1874 she was acquitted of that charge. On the 7th February 1874, the Joint Magistrate added to his former judgment or reasons of committal, the following remarks:—"Mussamut Itwarya is also committed to take her trial before the Sessions Judge, on a charge of attempting to murder the girl Ramkoori under s. 307." The prisoner was not put on her defence, and no witnesses were examined on the second charge: the Magistrate

* Criminal Appeal, No. 201 of 1874, against an order of the Sessions Judge of Patna, dated the 6th February 1874.

simply enquired of her whether she wished to examine any further witnesses before the Sessions Judge, to which she intimated she did not require any further witnesses, but would examine the witnesses named in the former charge. On the 11th February 1874 she was tried for attempt to murder the girl, found guilty by the majority of the jury, and sentenced to ten years' transportation.

The girl Ramkoori was examined, and the Sessions Judge being of opinion that she did not understand the nature of an oath allowed her to give her testimony without oath or solemn affirmation, and her evidence was taken on simple affirmation only. The Judge found that she was the only eye-witness of the offence.

Mussamut Itwarya appealed. The record of the case having been sent for by the High Court (Kemp and Glover, JJ.), and notice given to the Magistrate, the matter now came on for argument.

Mr. Colles (Baboo Kalikissen Sen with him) for the prisoner.—The evidence of the girl is inadmissible; it ought to have been given on oath or solemn affirmation; see Act X of 1873 (the Indian Oaths Act), s. 5. That section lays down that all witnesses must be affirmed or sworn; that is the particular enactment in the Act, s. 13 contains a general enactment, viz., that no omission to take an oath or affirmation will invalidate the proceedings. Where there is a particular enactment and a general enactment in the same Statute, and the latter taken in its most comprehensive view would overrule the former, the particular enactment must prevail—*Pretty v. Solly* (1) *De Winton v. The Mayor of Brecon* (2); see also the *Queen v. Piran* (3); therefore it is submitted that a limited construction should be put on s. 13, and that “no omission” in that section must mean no unintentional omission, but in this case the omission was intentional. No one reading the Oaths Act can doubt that the intention of the Legislature was to make an oath or affirmation compulsory on persons testifying in Court, and regard must be had to the intention of the Legislature—*Hawkins v. Gathercole* (4). Under s. 118 of the Evidence Act a child

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(1) 26 Beav., 606.

(2) Id., 533.

(3) 13 B. L. R., App., 4. r

(4) 6 De G. M. & G., 1; see p. 21.

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can be a competent witness, but he must give his evidence according to law, that is, according to the provisions of the Oaths Act; the old law, Act II of 1855, s. 15, was different as to children's testimony. If this child's evidence is excluded, there is nothing proved against the prisoner.

Again, there has been no preliminary enquiry made by the Magistrate into the present charge; this he was bound to make under Chapter XV of Criminal Procedure Code (Act X of 1872). [KEMP, J.—We can direct a new trial.] It is submitted that there is no sufficient ground for such a course in the present case, there being no evidence whatever against the prisoner except that of the girl Ramkoori.

The Magistrate did not appear.

The judgment of the Court was delivered by

KEMP, J.—This prisoner has been convicted under s. 307 of the Indian Penal Code, and has been sentenced to transportation for ten years. The trial was by jury. The points taken are, first, that the Judge was wrong in not permitting the jury to refer to the evidence in a case in which this prisoner was committed for an offence under s. 302, and of which she has been acquitted, inasmuch as the evidence in both trials is the same, and refers to the same occurrence and to the same party accused; second, that the evidence of the witness Ramkoori is not legal evidence as s. 118 of the Evidence Act does not obviate the necessity of, an oath or solemn affirmation.

Another point of law has been taken before us by the learned Counsel who appears for the prisoner, namely, that no preliminary enquiry was held by the Joint Magistrate with reference to the charge of an offence under s. 307, that the prisoner was not put upon her defence upon that charge, and that she has been prejudiced by this irregularity in the procedure, inasmuch as she had no opportunity of cross-examining the witnesses on this charge, and has been deprived of the benefit of testing the accuracy of their evidence by comparing their depositions in the Sessions Court with the evidence which they gave before the Joint Magistrate.

With reference to the objection taken as to the inadmis-

ability of the evidence of the girl Ramkoori, under s. 15 of Act II of 1855, the old evidence law, this evidence would have been admissible. S. 15 enacts that "any person who, by reason of immature age, or want of religious belief, or who by reason of defect of religious belief, ought not, in the opinion of the Court, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth." Now in this case Ramkoori is a child of immature age; she has been examined on simple affirmation; and her evidence would have been admissible under Act II of 1855. We have now to consider whether under the new law her evidence is admissible. Under s. 118 of the Evidence Act, this little girl is a competent witness, for the Court below has considered that she understood the question put to her, and was able to give rational answers to those questions. But it has been contended that, although she is a competent witness, her statement is inadmissible, inasmuch as it is not a statement on oath or solemn affirmation, and we have been referred to Act X of 1873. S. 5 enacts that oaths or affirmations shall be made by the following persons, namely, "all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence." The learned Counsel, therefore contends that inasmuch as this girl has not been examined on oath or solemn affirmation, her evidence is inadmissible; but under s. 13 of the same Act, it is enacted that "no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." Now it is clear that in this case, the Sessions Judge being of opinion from the answers given by this little girl that she was not aware of the responsibility of an oath, examined her on simple affirmation.

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Therefore the omission to examine the witness on oath or solemn affirmation was an omission which was knowingly made by the Judge, and it cannot be said that because the omission was knowingly made, it renders the evidence inadmissible under s. 5, for section 13 says that no omission of any kind, whether made knowingly or otherwise, shall render the evidence of a witness inadmissible. We, therefore, do not think, on the first point, that the child's evidence was inadmissible, and the Judge has properly left the amount of credibility to be attached to her evidence to the consideration of the jury.

Then with reference to the second point,—namely, that the Judge ought to have allowed the jury to refer to the evidence of the former trial for murder in which this prisoner was acquitted,—we observe that the Judge in his charge to the jury remarked “that that case was not before them, and that they must be governed solely by the evidence in the case before them,” that is the present case in which the prisoner is charged with an offence under s. 307. With reference to this point we would refer to the remarks made by the late Chief Justice, Sir Barnes Peacock, in the case of the *Queen v. Dwarkanath Dutt* (1), to the effect that a Court before which a second trial is held has nothing to do with the evidence given on the former trial, except for the purpose of ascertaining whether the offence which formed the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same, the former convictions or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge, notwithstanding that the evidence given in the two cases is the same; and the Court, whether the same as that which tried the prisoner for the first offence or a different Court, is bound to apply its own judgment to the evidence before it, and to give a verdict according to its own conviction. Now in this case, it is clear that the offence is not the same on which the prisoner

(1) 7 W. R. Cr., 15; see p. 11.

Itwarya had been committed on a charge of murder of the boy Juggernath under s. 302. In the present case, she is committed on a charge of attempting to murder the girl Ramkoori under s. 307 ; and, therefore, we do not think that the Judge was wrong in that part of his charge to the jury.

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Then we come to the third point, and we think that there must be a retrial for the following reasons :—On the 31st December 1873, the Officiating Joint Magistrate of Patna drew up a charge against the prisoner Itwarya charging her with the murder of Juggernath under s. 302, the prisoner was called upon to enter upon her defence, she did so, and on the same day, namely, on the 31st of December, a charge was drawn up, and she was committed on that charge alone, and she was acquitted of that charge on the 6th of February. On the 7th of February we find that the Magistrate adds the following remarks to his former judgment or reasons of committal, *vis.*, “Mussamut Itwarya is also committed to take her trial before the Sessions Judge on a charge of attempting to murder the Girl Ramkoori under s. 307.” The prisoner Itwarya was not put upon her defence, no witnesses were examined with reference to the second charge under s. 307, and all that was done was to ask her on the 7th of February whether she wished to examine any further witnesses before the Sessions Judge, on which date she intimated that she did not require any further witnesses to be sent for, but would examine the witnesses she had already named on the former charge. Now, under s. 283 of the Code of Criminal Procedure, no finding or sentence passed by a Court of competent jurisdiction can be reversed or altered on appeal on account of any error or defect either in the charge or in the proceedings on or before the trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in a charge to a jury, unless such error or defect has occasioned a failure of justice either by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence. Now in this case it is clear that the procedure in the Joint Magistrate’s Court has prejudiced the prisoner in her defence ; she has not had the opportunity which she ought to have had of cross-examining the witnesses, and in this case there were none

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examined in the matter of the charge made against her under s. 307.

We therefore think that looking to the irregularity in the proceedings of the Joint Magistrate in this case, the trial of the prisoner Itwarya on a charge under s. 307 of the Indian Penal Code must be quashed. The Joint Magistrate will be directed to hold a preliminary enquiry according to law, giving the prisoner an opportunity of cross-examining the witnesses who may be adduced in support of the charge under s. 307, and if he is satisfied with that evidence, he can recommit her to take her trial in the Sessions Court. The Magistrate will be directed to proceed at once with the new trial (1.)

Appeal allowed.

PRIVY COUNCIL.

P. O.*

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June 18, 19,
20 & July 24.

GANENDRO MOHUN TAGORE (PLAINTIFF) v. RAJA JUTTEN-
DRO MOHUN TAGORE, BAHADOOR AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Will—Proviso for Cesser—Conditional Limitation—Breach of Condition—Residence.

P C T, a Hindu, died leaving an only son G M T, and having made a will in English form, whereby after declaring that he had already made sufficient provision for G M T and that he was to take nothing under the will, he gave all his property to trustees, as to the personalty upon trust "to collect and get in the same (save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use)," and after paying debts and such legacies as were not by the will postponed in payment, to invest the residue, and pay out of the income certain annuities, and the postponed legacies as they became due, and to pay

* Present: SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
SIR R. P. COLLIER.

(1) *Post*, App., 1.

the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of the real property or the profits thereof; and as to the realty, upon trust until the debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities if the personality should be inadequate and subject thereto to pay the residue to the person for the time being entitled to his real estate under the limitations thereafter contained "for the absolute use of such person." The testator further directed that the trustees should hold the estate generally for the use and benefit of such person so far as was consistent with the trusts and provisions of the will: that out of the income, after paying the necessary costs of managing the estate "including the expense of the establishments in the mofussil, and Calcutta" such person should receive Rs. 30,000 per annum; and that, as soon as the legacies and annuities were paid and had fallen in, the trustees should convey the real estate unto and to the use of the person or persons who should be entitled to the beneficial interest therein. The testator then devised (subject to the devise to the trustees) his "real property" and also his "library, horses, carriages, farmyard, furniture of the *baithakbana*, jewels, gold, and silver plates, &c.," to *J M T* for life, and to the sons of *J M T* successively in tail male, with subsequent limitations over in the English form. The will then contained the following proviso:—

"Provided always, and I here by declare that, if any devisee, or tenant for lifeshall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said *baithakbana* house, and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then, and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed" as if the person committing any breach of such conditions had then died. The testator died in August 1868; and shortly afterwards *G M T* brought a suit to set aside the trusts and limitations in the will, except so far as they were for the payment of debts legacies and annuities, in which suit the final order of the Privy Council of 9th August 1872, declared all the limitations subsequent to the life-interest given to *J M T* to be void and inoperative; and further declared that *J M T* was entitled to a life-interest in the realty, and also in the personality directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made and to the provisions in the will not declared to be void, and also, until the legacies and annuities fell in and were satisfied, to Rs. 2,500 a month out of the realty, and also to the surplus rents of the same and the surplus interest of the personality; and that upon the failure or determination

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of the life-interest of J M T, G M T was entitled as heir-at-law to the real and personal property.

The proviso for cesser was not among the provisions of the will which were declared void. J M T was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the *baithakhana* house; and J M T who had a family dwelling-house of his own, used, up to November 1869, to attend at the *baithakhana* daily for the transaction of business. In November 1869 J M T quarrelled with his co-trustees, and ceased to go to the *baithakhana*. In April 1870 he demanded from the other trustees that possession of the *baithakhana* should be given to him, and upon their insisting on the right to occupy the portion of the *baithakhana* used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favor: the trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that J M T should enter into possession; and the trustees were ordered to deliver to him possession of the *baithakhana*, except the portion of the ground floor occupied for the business of the estate. After obtaining this decree, J M T found that the *baithakhana* was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court, J M T, in December 1871, brought a suit to compel them to effect the necessary repairs: the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently repairs were begun which were completed in October 1872.

In a suit by G M T, alleging that J M T had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the *baithakhana* house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the plaintiff was entitled to take advantage.

Held that as the clause provided for the cesser and determination of the life-interest of J M T in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened.

Held that the clause could not be construed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and J M T's estate perfected by a conveyance.

But *held*, on the evidence, that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872 was not unreasonable.

Where in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition, exclusive residence is not supposed to be meant; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence, is a sufficient compliance with the condition.

APPEAL by the plaintiff from the decision of the High Court at Calcutta (Macpherson and Pontifex, JJ.) in its Ordinary Original Jurisdiction dated 31st May 1873. The facts of the case are fully stated in the report of the case in the Court below (1).

Mr. *Joshua Williams*, Q.C., Mr. *Leith*, Q.C., Mr. *J. D. Bell*, Mr. *Forbes*, and Mr. *Lawrence Biale*, for the appellant, contended that by the clause of the will which provided for cesser, the estate given by the will was to cease at a given period; there was no absolute gift with a clause of forfeiture on the happening of a condition named. With regard to the English law of forfeiture for breach of condition, they cited *Dunne v. Dunne* (2), *Wynne v. Fletcher* (3), *Walcot v. Botfield* (4), and *Sheppard's Touchstone*, pp. 148, 157. A proviso that on a certain event happening an estate shall cease, is valid—*In re Hodge's Legacy* (5). [Sir B. PEACOCK.—Is there a breach of a condition? You want a Court of Equity to divest an equitable estate for breach of a condition subsequent. Story says:—"It is a universal rule in equity never to enforce either a penalty or a forfeiture. Therefore Courts of Equity will never aid in the divesting of an estate for a breach of a covenant on a condition subsequent; although they will often interfere to prevent the divesting of an estate for a breach of covenant or condition;" 2 Story's Eq. Jur., s. 1319. You cannot enforce this cesser or forfeiture without asking that the trustees may account in respect of the resulting trust.] The High Court administers both law and Equity—it is not merely a Court of Equity. [Sir B. PEACOCK.—It administers justice according to the rules of law and according to the rules of equity as administered in the Courts of England, but it does so in one suit instead of as formerly in two suits.] The defendant, Juttendro in not complying with the conditions imposed by the will has lost all right and interest in the property as if he had died, and according to Hindu law gifts of immoveable property to subject to a condition are construed strictly in favor of the heir of the donor. [Sir B. PEACOCK.—It is a question whether it is

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(1) 12 B. L. R., 1.

(2) 7 De. G. M. & Gordon, 207.

(3) 24 Beav., 430.

(4) Kay, 53.4

(5) L. R., 16 Eq., 92.

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a conditional limitation or a condition subsequent. My impression is that it is a conditional limitation : the estate ceases on the condition not being performed ; the condition is the limit of the estate and then, on a cesser, there is a resulting trust in favor of the heir-at-law. Sir L. PEEL.—In Hindu law, we must look at the intention : we have nothing to do with conditional limitations or forfeitures on conditions subsequent according to English law, and we shall not advance the interpretation of the Hindu law thereby.] Upon the evidence there was a distinct breach of the condition, and the event has happened upon which, according to the true construction of this clause, it was the testator's intention that the estate or interest of Juttendro in the subject-matter of the clause should cease and determine. There has been no sufficient residence to comply with the terms of the will. [Sir L. PEEL.—What is the quantum of residence required ? “ Cease to use as his residence ” are the words used.] The residence should be the same as that adopted by Prosnoo Coomar Tagore. The judgment of the High Court has found on the evidence as to the quantum of residence by the testator, and has stated its opinion as to the quantum of residence imposed by the will.

Mr. Forsyth, Q.C., and Mr. Doynes (Mr. Cowie, Q.C., with them), for the respondent Juttendro, contended that the clause, whether construed as one of forfeiture or as a conditional limitation, did not operate to defeat the interest of Juttendro, (i), because the limitations to take effect after that interest had been determined had been declared to be void, and therefore the condition itself was void and did not enure for the benefit of the heir-at-law ; (ii), the estate could not be forfeited or cease to be till it had been vested in the devisee by a conveyance, for till then the condition did not attach ; (iii), on the evidence the events had not happened upon which the estate was to determine, the condition of residence having been sufficiently complied with. The learned Counsel relied principally upon the third and fourth grounds given above ; and referred to the evidence of litigation and want of repair as justifying any delay which might have occurred. But in reference to the

effect of the clause they contended that in construing it, especially in favor of a forfeiture, all the circumstances should be taken into consideration including the evident intention of the testator that Ganendro should not take. [Sir M. E. SMITH.—If the condition fails, the heir-at-law takes it free from all conditions.] The testator would never have inserted the clause if he had thought the appellant would take. And the clause being one of forfeiture, must be construed strictly. [Sir B. PEACOCK.—It is not a clause of forfeiture, but a conditional limitation, which makes all the difference.] The cesser was not intended to apply until the estate was vested in the devisee and conveyed to him by the trustees; it was matter of construction when the condition attached, and matter of evidence whether it was broken. [Sir J. COLVILLE.—Upon a question of construction do you say that the effect of the clause is to postpone the possession and enjoyment of the house until the conveyance was executed? Sir L. PEEL.—It would surely be an erroneous construction to say that the testator intended that the person beneficially entitled should possess and enjoy the house, but the moment it was conveyed to him by the trustees, a cesser or forfeiture might attach.] Juttendro's whole interest under the will was attached in litigation. Pending that litigation he could not incur forfeiture in favor of the heir who was disputing his title under the will. If he took possession, he was a trespasser; if not, he incurred the penalty of forfeiture. The appellant, during the interval of litigation while he was denying the respondent's title to possession, was estopped from saying that there had been a forfeiture by reason of non-residence. Upon the evidence he went into possession after the decree of July 1872, and the question was whether there had been a residence within a reasonable time. Want of repair was a justification for non-residence. The learned Counsel cited 2 Jarman on Wills p. 51, 3rd ed., and the cases there referred to—*Wynne v. Fletcher* (1), *Ridgway v. Wodehouse* (2), and *Clavering v. Ellison* (3). Residence may mean anything, it is a very vague expression; to make the clause valid the kind of residence must be defined—*Walcot v. Botfield* (4).

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(1) 24 Beav., 430.

(3) 7 H. L. Ca., 707

(2) 7 Beav., 437.

(4) Kay, 534.

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Fillingham v. Bromley (1). As to the quantum of residence being the same as that of the testator, they drew attention to the fact that the testator was a latitudinarian, whilst Juttendro was a strict Hindu. Finally, upon the effect of the clause, they cited *Seymour v. Vernon* (2), and contended that it was wholly invalid. It was not a forfeiture of an estate created by the testator, but a forfeiture of each person's successive interest in it, which was void; and being void in itself at the date of the will, it could not be validated by the destruction of the subsequent interests. The condition originally was distributive, and therefore bad; and it did not become valid because, by the invalidity of the subsequent gifts, it had in effect ceased to be distributive.

Mr. *Joshua Williams*, Q.C., in reply, contended in reference to the construction of the clause, and the question whether or not the condition had attached, that the clause should be read distributively, and that an immediate and continuous residence by the life-tenant was an essential condition to the continuance of his interest. The contention on the other side that the condition did not attach till the conveyance by the trustees was executed in effect involved an indefinite postponement of the condition coming into effect, that is until the death of the last annuitant. Juttendro had obtained possession of the house from the trustees, and the condition of residence had attached and had been broken.

The judgment of their LORDSHIPS was delivered by

SIR MONTAGUE E. SMITH.—The questions in this appeal arise upon a clause in the will of the late Hon'ble Prosona Coomar Tagore, making provision for the cesser of the estate of the persons entitled under the limitations of the will in the event of non-residence in his *baithakhana* house.

The will, by which the testator devised his estates, after the determination of the life-estate given to Juttendro Mohun Tagore (the first respondent), to Juttendro's sons successively in tail male, with subsequent limitations over according to English forms of limitations, underwent much consideration in the Courts in India and in this tribunal. The final decision, speak-

(1) 1 T. & R., 530.

(2) 33 L. J., Ch., 690.

ing generally, was that the limitations in tail and subsequent limitations were contrary to Hindu law, and void, and that upon the expiration of the first life-interest, the appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will, and to some of its provisions.

The testator expressly declared that his son, the appellant, should take nothing under his will.

He devised all his real and personal property to four trustees (of whom Juttendro was one) in trust to get in the personalty, with an exception thus expressed:—"Save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use." Upon trust, after paying debts and legacies, to invest the residue, and pay out of the income divers annuities, and the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of his real property or the profits of it. And as to the realty upon trust until his debts, legacies, and annuities, had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities if the personalty should be inadequate, and, subject thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereafter contained "for the absolute use of such person;" and he further directed that the trustees should hold the estate generally for the use and benefit of such person so far as was consistent with the trusts and provisions of the will.

The testator directed that out of the income, after paying the necessary costs of managing his estate, "including the expense of the establishments in the mofussil and Calcutta," the person for the time being entitled to the beneficial enjoyment or surplus

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income of his real property should receive Rs. 2,500 a month, or Rs. 30,000 a year. As soon as the legacies and annuities were paid and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be entitled to the beneficial interest therein. The will, after mentioning numerous legacies and annuities, contains the specific limitations of the realty which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a talook in Zilla Rangpore, subject to a *jama* of Rs. 40,555, and of the *baithakhana* house, land, and premises where he usually resided. He then devises (subject to the devise to the trustees) his "real property." and "also library, horses, carriages, farmyard, furniture of the *baithakhana*, jewels, gold and silver plate, &c., unto and to the use of Juttendro (the respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows :—

"Provided always, and I hereby declare that if any devisee or tenant for life or entail or otherwise, or any person entitled to take as heir by descent or adoption or otherwise, or in any manner under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited as aforesaid or any portion thereof, to be sold for arrears of Government Revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said *baithakhana* house and premises where I now reside, and make use and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and immediately thereupon, the devise and limitations in this my will contained and declared, shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person so permitting or suffering the said property or any portion thereof to be sold for arrears of Government revenue, or so ceasing to keep up in a state of repairs, and to use as his residence my said *baithakhana* house, had then died."

It was contended in the former suit by the appellant that Juttendro's life-estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this tribunal that there was no uncertainty, for his interest was to

begin at once. It is said in the judgment :—" Their Lordships read this will, alike according to its words and substance, as giving a life-interest subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid" (1).

The testator died on the 30th August 1868. This suit was brought by the appellant on the 18th November 1872, to have it declared that the interest of Juttendro had ceased by reason of his non-compliance with the clause relating to residence, and that the appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the bar : (i), that the limitations to take effect on the determination of Juttendro's interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach of it ; (ii), that the condition would not attach until Juttendro became entitled to a conveyance from the trustees on the death of the last annuitant ; and (iii), that, if this were not so, there had been in fact no breach of the condition.

On the first point there Lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life-interest of the respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the appellant would be entitled to succeed as heir.

On the second point, it was contended for the respondent that, having regard to the other causes of forfeiture, and especially that for non-payment of the Government *jama*, which far exceeded in amount the annual payment of the Rs. 30,000, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end, and the donee's estate was perfected by a conveyance. It was urged, on the other hand, by the appellant's Counsel,

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that the clause should be read distributively. They contended also that Juttendro, according to the language and substance of the decision of this tribunal, had a present life-interest, subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was observed that Juttendro had actually recovered the possession of the *baithakhana* house in a suit against the trustees, so that if the respondent's contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the estate except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their Lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it, nor is it necessary for them to do so, since they agree with the judgment of the High Court in favor of the respondent on the third point, *viz.*, that there has been no breach, in fact, of the condition.

"*Baithkhanu*" appears to mean a house, or the part of a house, used for sitting or reception rooms, where entertainments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the *zenana*, are usually the outer rooms.

The manner in which the testator himself used the *baithakhana* house, is thus found by the High Court:—

"It appears from the evidence that the testator possessed a family dwelling-house as well as the *baithakhana*, the two houses being completely distinct, and, indeed, situated on different sides of the same street; that some time before his wife's death, he ceased to sleep in the family dwelling-house after having complained of defective ventilation in his sleeping chamber there; that, thenceforth, he slept at the *baithkhana*; that subsequently, during his wife's life, he took his mid-day or principal meal in the family dwelling-house and his evening meal in the *baithakhana*; that, after his wife's death, he took both meals in the *baithakhana*; but the mid-day meal was taken in native fashion and was cooked at the family dwelling-house, and the evening meal was taken in European fashion and was cooked at the *baithakhana*; that he gave his native, or strictly Hindu, entertainments in his family dwelling-house, and his European entertainments at the *baithakhana*; that

the testator's family idols was always lodged and worshipped at his family dwelling-house and never at the *baithakhana*; and that, at the *baithakhana*, all the affairs of his estate were conducted and the necessary establishment kept up and lodged."

The opinion of the High Court on the nature of the residence imposed by the condition, is thus expressed:—

"We think it is to be gathered from the will that the testator never intended the *baithakhana* to be occupied as a dwelling-house in the ordinary sense of a Hindu dwelling-house." And again, "We are of opinion that the residence intended by him was an occupation for the purposes of transacting business and of receiving male friends and visitors, and, if the occupant of the house for the time being so desired (but not otherwise), for entertaining male friends with hospitality; and we are further of opinion that such an occupation does not require that either the occupant or the ladies of his family should sleep in the house."

Their Lordships think that in the main the High Court have properly construed the clause; and they understood the appellant's Counsel not to dispute this construction, but to contend that the evidence showed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument, as to the meaning of the word "residence." The principle, if any can be said to result from them, seems to be that where in a condition of residence no manner or period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition.

In one case Lord Eldon seemed to think a condition imposing residence generally, was so vague, that it was doubtful whether it could be enforced; and he held that, at all events, slight and rare instances of actual residence by the donee were, when the house was kept open by servants living in it, sufficient to satisfy so general a direction—*Fillingham v. Bromley* (1).

In a case—*The King v. Sargent* (2) where residence was a necessary qualification for the office of bailiff of a borough—Lord Kenyon

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(2) 5 T. & R., 466.

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said :—" It never can be contended that in order to constitute a residence in any place, it is necessary to reside any given number of days, or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience."

The words of the present clause are "*cease to use as his residence in Calcutta.*" It was not disputed that a reasonable time must be allowed to the donee after the testator's death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 30th August 1868, and the respondent did not, it would appear, use the *baithakhana* in any sense as a residence, until some large repairs were completed in October 1872. During this interval of time he visited the house, and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it.

The first question is, whether in the interval referred to, the respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his Counsel to justify the delay are : (i), the pendency of the great suit brought by the appellant to defeat his title altogether, which was begun in August 1868, and finally disposed of on appeal to Her Majesty in July 1872 ; (ii), his inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May 1870, and ended in March 1872 ; and (iii), the unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the appellant who disputed, in the suit referred to, the respondent's right to possession, and would, if his suit had been successful, have ejected the respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne profits, should now be heard to claim the estate on the ground that the respondent did not take possession during the time covered by this litigation. But, without saying that the appellant is estopped by his own conduct from taking advantage of the condition,

their Lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the trustees. The result of the suit he brought against the trustees was that he was declared to be entitled to the possession of the whole house. Their Lordships cannot but think he might reasonably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an office when the manager was his own servant, but the inconvenience to the respondent might be great when a clerk appointed by the trustees was installed within the precincts of the residential part of the house.

But a stronger ground to justify the delay existed in the state of the house and its want of repair. Mr. Allan, the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and rebuild a portion of the east wall at a cost of Rs. 6,200. But further extensive repairs were required. The trustees having hesitated to do them, the respondent requested Mackintosh and Co. to survey the house, who made a report to him that "the building throughout is urgently in need of repair." This report he sent to the trustees with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the respondent, who, upon this refusal, commenced in December 1871 a suit against them, and in March 1872 obtained a decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November 1872, at a cost of Rs. 14,000. Mr. Allan, the surveyor, says "the Rs. 14,000 was necessary to make the house safe. The house was entirely out of repair, and some portion of it very dangerous."

The respondent entered into possession in October 1872,

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before the repairs were entirely completed, and their Lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their Lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th November 1872, immediately after the completion of the repairs, in favor of the respondent; but as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their Lordships, to prevent future litigation, desire to state that on this point also they think the view of the High Court is correct.

The respondent, who appears to adhere more strictly than the testator to Hindu usages, has no doubt continued to take his meals and sleep in the family house, where the other members of his family live; but this mode of living is not of itself inconsistent with such a residence in the *baithakhana* house as the testator, in imposing the condition on his Hindu descendants, must be supposed to have contemplated. It appears upon the evidence that, since the respondent entered upon possession, the house has been constantly kept open, new furniture has been added to the old, the library taken care of, and not only durwans but menial servants have lived in the house. The respondent himself frequently, if not daily, went to the house and usually spent several hours there. It appears also that he transacted all affairs of business there, and on some occasions received visitors in rooms properly furnished for their reception. These acts appear to their Lordships, having regard to the nature of a *baithakhana* house and to Hindu usages, to amount to a use of it as a residence.

It was strongly urged by the appellant's Counsel that any entertainments the respondent might give ought to take place in the *baithakhana*, and it was said he had always given them at his family dwelling-house. The omission, however, to use the *baithakhana* for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments, their Lordships cannot

hold that the respondent is in any way obliged to give them. although in case he thinks fit to do so, he would best comply with the testator's will by using the *biathakhana* house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been removed from the *baithakhana* to the family dwelling-house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family house, and were so kept there for greater safety ; but the language of the condition in no way confined the use of the jewels to the residence in the *baithakhana*.

Their Lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November 1872, and within twenty months from that date their Lordships are able to report upon this appeal to Her Majesty. This instance shows that appeals from India, if prosecuted with vigour, may now be speedily determined.

In the result, their Lordships will advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellant : Messrs. J. S. & A. P. Judge.

Agent for the respondent : Mr. T. L. Wilson.

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ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex-

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7, & July 21.

MADHUB CHUNDER PORAMANICK v. RAJCOOMAR DOSS
AND OTHERS.

Contract Act (IX of 1872), s. 27—Small Cause Court, Law of—Agreement between Hindus—Acts IX of 1850 & XXVI of 1864—21 Geo. III, c. 70, ss. 17 & 18—Letters Patent, 1862, cl. 18—Letters Patent, 1865, cl. 19—Contract in Restraint of Trade.

The effect of Act XXVI of 1864 is that suits in the Small Cause Court are to be decided according to the law or equity administered in the High Court; by the Charter of 1862 that law or equity was to be "the law or equity which would have been applied by the Supreme Court; and by the Charter of 1865 that "which would have been applied by the High Court," under the Charter of 1862.

The Statute 21 Geo. III, c. 70, which applied to [the Supreme Court, and gave to Hindus the right to have matters of contract decided by their own laws, became, if its provisions apply to the High Court, part of the law of that Court not by virtue of the Statute itself, but by virtue of the Charter, which was subject to alteration by the Governor General in Council; and having ceased to have any operation as an Act, it was unnecessary to repeal it expressly by the Contract Act (IX of 1872.)

That Act is applicable to Hindus residing in Calcutta; therefore, where the plaintiff (a Hindu) agreed with the defendants, also Hindus, that he would cease to carry on his business in a certain locality in Calcutta, in consideration of receiving from them a specified sum, it was held in a suit to enforce the contract that such an agreement was void under s. 27 of the contract Act. The words "not inconsistent with the provisions of this Act" in s. 1 of the Contract Act apply to "any usage or custom of trade" or "any incident of any contract."

CASE stated for the opinion of the High Court by the First Judge of the Calcutta Small Cause Court.

"The plaintiff sued the defendants, for that the plaintiff having opened a shop in Kansareepara, in Simla, in the town of Calcutta, for the sale of copper utensils, the defendants proposed to the plaintiff to cease carrying on the said business in the said locality, on the ground of its being detrimental to their

business, and offered and agreed in consideration of his doing so to pay to the plaintiff all sums which he had then disbursed as advances to workmen, whereupon the plaintiff did agree and consent to cease carrying on the said business, and did accordingly cease; and that the defendants have neglected and refused to perform their part of the contract, to wit, to reimburse the plaintiff in all sums that he had advanced to workmen, whereby the plaintiff has sustained damages to the amount stated, namely, Rs. 900.

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"The plaintiff was a brazier, and had established a shop in the part of Calcutta named in his cause of action. The body of braziers carrying on business in the same locality held a public meeting, at which it was resolved, among other things, that none of their body would employ more than four under-workmen, and that then the trade would return to its former prosperity. The plaintiff then interposed, and said he would not conform to this resolution, as his business was so organized that it required from sixteen to twenty under-workmen to carry it on profitably, but he was willing to remove his shop elsewhere if his already expended advances were recouped to him, whereupon there was a regular shout 'we will pay your advances—those who take on your workmen will pay.' The plaintiff objected that he did not wish to have a hundred guarantors to look to, but if any four or five would undertake to pay him the advances which he had already given to his men, he would remove. The defendants undertook accordingly, and the plaintiff sues them on this undertaking, which was verbal. The sum advanced to the workmen was proved to be Rs. 900.

"It was contended by the Counsel for the defendants that this agreement was void under s. 27 of Act IX of 1872, being an agreement by which the plaintiff was restrained from exercising a lawful profession, or trade, business, and not coming under any of the three exceptions following that section."

The learned Judge held that the defendants' agreement did not come within s. 27 of Act IX of 1872, inasmuch as there was nothing in it restraining the plaintiff from setting up the same trade in some other locality, or even in the very next house to that which he then occupied for it; that it was a mere engagement on his part

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to remove his business out of that house, and, perhaps, it might be construed to have been the intention of the parties that he should remove it from that locality, but that it was not an engagement restraining him from exercising that business altogether. He was also of opinion that if this engagement did come within the meaning of s. 27, it would be only void to the extent to which it restrained one of the parties from exercising his trade, but that it would still operate to make the consideration-money payable to him.

Judgment was accordingly given in favor of the plaintiff; but at the request of the learned Counsel for the defendant it was made contingent on the opinion of the High Court upon the question, whether the agreement was void within the meaning of s. 27 of Act IX of 1872.

Mr. Bonnerjee for the plaintiff.—The restraint referred to in s. 27 of the Contract Act must mean an absolute and not a partial restraint; according to English law a partial restraint of trade like the present would be perfectly legal. [Couch, C.J.—The Contract Act seems to have departed from the English law. PONTIFEX, J.—The Act is not exhaustive of the law of contracts, it amends the law in some particular instances; see the preamble. The decisions of the Court of Chancery show that a limit must be fixed within which the trade is not to be carried on. Does not the same principle apply here?] Probably it does. But in the present case the restraint was limited to Kansareepara in Simla. S. 28 declares agreements by which a party is restricted absolutely from enforcing his rights under a contract to be void: the word “absolutely” is not used in s. 27. [Couch, C.J.—That is rather against you, as it shows that the Legislature has used appropriate language when dealing with absolute restrictions.] A partial restraint is most beneficial as tending to encourage industry and trade. It would be very hard if a master could not make a binding agreement with his apprentice not to carry on the trade he had learnt within certain circumscribed limits.

Mr. Kennedy for the defendants.—This question is one to be

decided on the express words of the Act, and the words used in it must be read in their ordinary sense—*Grey v. Pearson* (1). The construction which is sought to be put upon s. 27 is forced. Here it is agreed that a party shall not carry on a trade in a certain locality; this is a restraint, and clearly comes within the purview of the section, and, therefore, the agreement is void. The 1st Exception to s. 27 illustrates the meaning of the section. [PONTIFEX, J., referred to *Avery v. Langford* (2).]

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Mr. *Bonnerjee* in reply.

Cur. adv. vult.

Before judgment was given, Mr. *Bonnerjee* drew the attention of the Court to the fact that this was a matter between Hindus residing in Calcutta, and asked to be allowed to argue that the Contract Act did not apply to such a case. Leave was granted, and this question came on for argument on the 15th June 1874.

Mr. *Bonnerjee* for the plaintiff.—By Act IX of 1850, s. 37, the Judges of the Small Cause Court are empowered to determine all questions as well of fact as of law or equity as administered in the Supreme Court. By 21 Geo. III, c. 70, s. 17, the Supreme Court was bound to decide all matters of contract arising between Hindus by Hindu law, and that is the law applicable to the present question. But even if the Small Cause Court is now bound to administer the law or equity administered in the High Court that law and equity are the same as were administered in the Supreme Court; see the Letters Patent of 1862, cl. 18, and the Letters Patent of 1865, cl. 19. Now ss. 17 and 18 of 21 Geo. III, c. 70, have never been repealed, and are not noticed by the Contract Act. It cannot be considered that they have been repealed by implication, as s. 1 of the Contract Act states that nothing therein contained shall affect the provisions of any Statute not expressly repealed thereby. The words at the end of s. 1, “not inconsistent with the provisions of this Act” refer to “any usage or custom of trade.” [Couch, C. J.—The Act extends to the whole of British India.] The words British India are of territorial import, and

(1) 6 H. L., Ca., 61.

(2) Kay 663.

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do not mean that the Act shall affect all the people dwelling therein. [COUCH, C.J.—If the Act extends to British India, any person exempted from its operation must be expressly mentioned.] The Indian Christian Marriage Act (XV of 1872) is declared to extend to the whole of British India, yet it could not be contended that it applies to all the inhabitants of Hindustan. The whole of s. 1 of the Contract Act must be read together; the Legislature knew what Laws and Regulations were in force, and such of them as it was considered necessary to repeal are repealed. The Act is general, and will not repeal or affect a prior special Act, such as 21 Geo. III, c. 70, without express words of reference thereto—*Fitzgerald v. Champneys* (1), *The London & Blackwall Railway Co. v. The Limehouse District Board of Works* (2), *Conservators of the Thames v. Hall* (3) and *Thorpe v. Adams* (4). Up to the present time it was the policy of the law to allow Hindus to be governed by their own laws in certain cases, and the general words of an Act are not to be construed to alter such policy—*Menit v. Leman* (5). On these considerations therefore it is submitted that the Contract Act applies only to cases governed by English law and to the mofussil. No doubt,] there are Illustrations in it which would appear applicable to Hindus, but they must be taken to apply to residents in the mofussil only.

Mr. Kennedy for the defendants.—The Statute 21 Geo. III, c. 70, was part of the law of the Supreme Court, but it does not apply to the High Court as a Statute, but as having been introduced as part of the law of the Supreme Court by the Charter of 1862. It then became inoperative, the Court to which it applied having been abolished. It was therefore unnecessary to repeal it. [COUCH, C. J.—According to that argument it would have been equally unnecessary to have repealed the Statute of Frauds, as that also only applied to the Supreme Court.] No, it was necessary to repeal that Statute, as it had been introduced into the Mayor's Court by reason of its being part

(1) 2 J. & H., 31.

(2) 3 K. & J., 123.

(3) L. R., 3 C.P., 415.

(4) L. R., 6 C. P., 125.

(5) 20 Beav., 269.

of the substantive body of English law. [Couch, C.J.—That is a vexed question—*Freeman v. Fairlie* (1).] As soon as there was a Court in Calcutta, it administered English law. If the Statute of Frauds had not been repealed, it might have been contended it was a rule of the *forum*, as a question of evidence, and would affect the form of contracts. It appears clear from the Contract Act that the Legislature intended that it should apply to the whole population of British India; see Illustration (d) to s. 108. Regulation III of 1793, which provides that Judges in the mofussil are to act according to justice, equity, and good conscience, is not repealed expressly; it might therefore be argued with equal force that the Contract Act does not apply to Hindus in the mofussil. As to the rules to be observed in the construction of a Statute, see Bacon's Abridgment, tit. Statute.

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Mr. *Bennerjee* in reply.

Cur. adv. vult.

The opinion of the Court was delivered by

Couch, C.J. (who, after shortly stating the facts, proceeded):—The case, as stated, assumes that Act IX of 1872 applied, and when the case was first argued before us, no question was raised as to the application of that Act, but, subsequently, when we were about to give our judgment upon the question which had been stated in the case, it was submitted to us that the Act did not apply in the Small Cause Court to a case of this kind between Hindus; that the law as it was before the Act was passed continued applicable, and the case was governed by, Hindu law. Although, the question was not raised in the case, we thought it desirable to have it argued, and I propose first to give our opinion upon it.

S. 37 of Act IX of 1850, by which the Small Cause Court, Calcutta, was regulated, provides that "the Judges of the Court shall be empowered to determine all questions as well of fact as of law and equity, as administered in the Supreme Court, in all cases which they have authority to try." The words "as

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administered in the Supreme Court" must be construed as referring, not to the law or equity which might, at the time when the Act was passed, be administered in the Supreme Court, but to the law or equity administered at the time of the suit. The intention of the Legislature was that, the Small Cause Court having given to it a jurisdiction to entertain suits which were not allowed to be brought in the Supreme Court, there should be a uniformity of law or equity in the two Courts. If the law or equity administered in the Supreme Court was, either by legislation or the decision of the Judges in any way altered, I think it was the duty of the Small Cause Court to adopt such alteration, and from time to time to decide the questions which came before it in the same way as they would be decided in the Supreme Court. Then Act XXVI of 1864 was passed for the purpose of extending the jurisdiction of the Small Cause Court: and by s. 16, it is provided that it and the Act IX of 1850 shall be read and construed as one Act, as if the several provisions contained in Act IX of 1850 not inconsistent with the provisions of the later Act were repealed and re-enacted in it. The effect of that appears to be that from the time when Act XXVI of 1864 was passed the Small Cause Court was regulated by a new Act consisting of such of the provisions of Act of IX 1850 as were not inconsistent with Act XXVI of 1864, and also of the provisions contained in that Act. If you incorporate, as you must, s. 37 of Act IX of 1850 with the Act of 1864, it would literally read that the law to be administered in the Small Cause Court is the law which was administered in the Supreme Court; but it is clear that this could not have been the intention because the Supreme Court had ceased to exist and the High Court had been substituted for it. And the 1st section of Act XXVI of 1864 says that the words "Local Government" and "High Court," as used in that Act, were to bear the same meaning as the words "Governor in Council" and "Supreme Court," as used in Act IX of 1850.

The result is that by virtue of Act XXVI of 1864 suits in the Small Cause Court were to be decided according to the law or equity administered in the High Court. Then the question

is what is the law which is administered in this Court? The Charter of 1865, in the 19th clause, provides for that. It is :—
 “We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.” This renders it necessary to see what was the provision in the Charter of 1862. Cl. 18 of that Charter is :—“We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall (until otherwise provided) be the law or equity which would have been applied by the said Supreme Court at Calcutta to such case if these Letters Patent had not issued.” It is to be the law or equity which would have been applied by the Supreme Court of Calcutta if the Letters Patent had not issued; but the law or equity to be administered in the High Court, does not depend upon any previous Act of Parliament. The Act 21 Geo. III, c. 70, which gave to Mahomedans and Hindus the right to have matters of contract and dealing between party and party, inheritance, and succession, determined by their laws and usages, was an Act which was applicable to the Supreme Court. If the provision has effect in the High Court, it is not by virtue of the Act, but by virtue of the Charter, which by its terms introduces into it the directions contained in the Act. The right or privilege before the Contract Act was passed (subject to what I shall say as to that Act) no longer depended on the Act of Geo. III, but upon the Charter itself. Her Majesty had power by the Act which authorized the establishment of the High Courts to give to them such jurisdiction as she thought fit, and to make the provisions which are contained in the Charter; and all that is done, is to provide that the law or equity to be applied to each case shall, until otherwise provided, be the law and equity which would have been applied by the Supreme Court. “Until otherwise provided” shows that there was an intention

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to give to the Government here in its legislative capacity a power to make alterations which would affect this provision. There are not only those words, but there is the 44th clause of the Charter of 1865, where it is expressly declared that the provisions in it are subject to the legislative powers of the Governor General in Council.

Therefore we have to see whether Act IX. of 1872 governs cases between Mahomedans or Hindus brought before the High Court in the exercise of its original civil jurisdiction. If it does, it will certainly also govern cases which have to be decided by the Small Cause Court. The 1st section says in the most general terms that the Act is to extend to the whole of British India. These words would certainly include the limits of the original jurisdiction of this Court, and all persons living within those limits, who sue or are sued in it. Unless we find in the Act something to limit the meaning, we ought to come to the conclusion that this was the intention of the Legislature. There are several Illustrations in the Act which show that it was the intention of the Legislature to apply it to Hindus. It was replied to this by Mr. Bonnerjee that these Illustrations may be accounted for by the Act being applicable to Hindus in the mofussil, and that it does not follow from them that it was the intention to apply it within the limits of the original jurisdiction of this Court. Still, the circumstance that it was evidently the intention of the Legislature that it should apply to Hindus beyond the limits of the original jurisdiction, makes it more incumbent on a person seeking to establish an exception in respect of the original jurisdiction to show that the exception is apparent in the Act. There are no words showing that it was intended that there should be such an exception. The only provision which might raise a doubt about it is that which follows in the 1st section, where it is said :—"The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof ; but nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act."

The grammatical construction of this is that the words "not

inconsistent with the provisions of this Act" apply to "any usage or custom of trade" or "any incident of any contract." This excludes any repeal by implication, because the Legislature has said that unless the enactment is mentioned in the schedule it is not to be affected by the Act. This Act of Geo. III is not mentioned in the schedule, and, therefore, it cannot be considered to be repealed. This would be important if it had been necessary to repeal the Act of Geo. III, and there would have been great difficulty in deciding the question before us. But for the reasons I have stated, it was not necessary to do so. The Act of Geo. III had ceased to have operation as an Act. The Court to which it applied had ceased to exist. The substance of it, no doubt, continued to be the law till the Contract Act came into force, but it was the law by virtue of the Charter which was subject to alteration by the Legislative Power. For these reasons I think that the Contract Act must be considered to apply to the present case.

The question which remains for us to determine is, whether by s. 27 of the Act this agreement is rendered void. We must take it that there was a contract, for the learned Judge of the Small Cause Court has found that the parties had come to that agreement. The words of s. 27 are:— "Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void." I cannot agree in what the learned First Judge says as to the meaning of this agreement being that it was only to prevent the plaintiff from carrying on business in that particular house, and that he might have carried it on in the house immediately adjoining. It is obvious that the intention was to restrain him from carrying on business in that locality. The object of entering into the agreement could only be attained by preventing him from carrying on business in the locality. The words "restrained from exercising a lawful profession, trade, or business" do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the 1st Exception would have been unnecessary. It says:—"One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the

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buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable."

If the section did not apply to cases of carrying on business, within specified local limits, this would be unnecessary, because it would have been made unlawful for persons to make such an agreement. In the following section (s. 28) the Legislative Authority when it intends to speak of an absolute restraint, and not a partial one, has introduced the word "absolutely." It says:—"Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The use of this word in s. 28 supports the view that in s. 27 it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear. In my opinion they must be held to apply to such a case as the present, and the agreement on the part of the plaintiff not to carry on his business in that locality is to that extent void.

The First Judge of the Small Cause Court seems to have thought that although the agreement on the part of the plaintiff might be void, he might enforce the agreement for the payment of the money to himself. There is no foundation for such an opinion. If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money; and the whole contract must be treated as one which cannot be enforced. Therefore we must reply to the question which has been referred to us that the agreement is a void contract, and that the plaintiff has no right to recover the money which he has claimed.

We direct judgment to be entered for the defendants with the costs of suit, including the costs of reserving and arguing this case.

Attorneys for the plaintiff : Messrs. *Gray, Sen, & Farr.*

Attorney for the defendants : *Mr. Pearson.*

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Miller.

**DENONATH GANGGOOLY (PLAINTIFF) v. NURSING PROSHAD DASS
AND OTHERS (DEFENDANTS)***

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May 7.

Mortgage—Foreclosure—Regulation XXVII of 1806, s. 8—Cause of Action.

A, by a Bengali deed of conditional sale dated the 10th of August 1853, mortgaged two estates, the deed providing that the mortgage-debt should be repaid on the 9th of July 1855, and that, on default of payment, the deed of conditional sale should become one of absolute sale, and that the mortgagee should thereupon acquire the absolute proprietary right, and might enter upon and retain possession of the mortgaged property. A failed to pay at the time stipulated, and on the 18th of December 1856 her right, title, and interest in the estates were sold in execution, and purchased by the defendants without notice of the mortgage. On the 3rd of April 1866, the plaintiff bought the mortgagees interest, and in August 1867 he instituted foreclosure proceedings under Regulation XVII of 1806 against the defendants, the auction-purchasers. In a suit instituted by the plaintiff on the 22nd January 1874, against the auction purchasers to recover possession of the mortgaged property, *Held*, that the cause of action arose on 9th July 1855, when default was made in payment of the mortgage-debt, and the suit not having been instituted within twelve years from that date, was barred by s. 1, cl. 12, Act XIV of 1859. No new cause of action arose by reason of the foreclosure proceedings on the expiry of the year of grace in August 1868.

Where notice of foreclosure was shown to have been served according to the usual course of business in the Sheriff's office, the Court presumed that a copy of the application had been duly served therewith; but where it appeared that, according to the practice of the High Court, mention of the application would have been made in the order if it had accompanied the notice, and no such mention was made, the Court refused to make such presumption.

SUIT for a declaration of the plaintiff's right to and for possession of two estates called Cossimpore and Nowpara. These estates had, as the plaint alleged, formerly belonged to one Sookhmoney Dossee, who, by *kat-kobala*, or deed of conditional sale, dated the 27th Srabun 1260 (10th August 1853), mortgaged

* Regular Appeal, No. 118 of 1873, against a decree of the Subordinate Judge of Zilla Dinagore, dated the 20th February 1873.

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the estates to two persons named Joykissen Doss and Jumna Doss, to secure the repayment of Rs. 25,000 borrowed by her from them. The deed provided that the money should be repaid on the 26th Assar 1262 (9th July 1855) and proceeded :—

“If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true and absolute bill of sale; my and my successors rights will cease to the said zemindari; the proprietary rights, with the rights of gift and sale to it will accrue to you and your successors, and registering your names in the sarishta of the Collectorate, you will take possession of it in the mofussil; and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof.”

The right, title, and interest of Sookhmoney in the two estates were sold on the 18th December 1856 in execution of a decree of the Supreme Court, and Cossimpore was purchased by Nursing Proshad Dass, one of the defendants in this suit, and Nowpara by one Grish Chunder Banerjee, the ancestor of the other defendants. Previous to the sale, the mortgagees, by their attorney, Mr. Gillanders, wrote and sent to the Sheriff the following letter dated 15th December 1856 :—

“On behalf of Baboo Jumna Doss and Joykissen Doss, I hereby give you notice that the talook called or known by the name of Cossimpore, situate in the Zilla of Dinagapore, seized and advertized for sale by you as the property of the defendant above-named, has been mortgaged by the defendant to my clients, who have filed their petition to foreclose the same; under these circumstances further take notice that if you do not at once release the said property, my client will proceed against you without further reference.”

But the plaintiff failed to show that the Sheriff gave notice of the mortgage to the auction-purchasers, or that such notice would be given in the ordinary course of business in the Sheriff's office. The purchasers and their descendants had, since the date of the sale, remained in possession of the properties. Sookhmoney died without paying off the mortgage-debt, and on the 30th April 1866 the plaintiff purchased the interests of the mortgagees in the two estates, and subsequently, in August 1867, applied under Regulation XVII of 1806 for foreclosure of the mortgage. From the report of the serving peon (which was sworn to by him), it appeared that the notice had been duly

served on Nursing Proshad Dass, and there was nothing on the evidence to show that a copy of the plaintiff's application for foreclosure had not been served with it as required, by s. 8, Regulation XVII of 1806. With regard to Grish Chunder Banerjee, however, although the notice served upon him recited that a copy of the application for foreclosure was sent therewith, the notice alone was mentioned in the order of Phear, J., in the return of the Sheriff, and in the deposition of Krishto Roy, the serving peon; the practice on the Original Side of the High Court being to mention the application in the High Court order, and the return of the Sheriff where such application accompanies the notice.

The plaintiff instituted the present suit on the 22nd January 1872, alleging that under the foreclosure proceedings the conditional sale became absolute on the 23rd August 1868, and that his cause of action accrued on that date.

The defendants pleaded *inter alia* that the notice of foreclosure had not been regularly served upon them in accordance with the provisions of the Regulation, and that the plaintiff's suit was barred, not having been instituted within twelve years from the 26th of Assar 1262 (9th July 1855), the date on which the mortgage-money was payable by the deed of conditional sale. Upon these pleadings of the parties, several issues were framed by the lower Court, and among them the two following:—“(i), whether or not notice of the foreclosure had been regularly served; and (ii), whether or not the suit is barred by lapse of time; and whether limitation in this suit should run from the date of the realisation of the money prescribed in the *kat-kabala*, or from the date of the foreclosure proceedings, or purchase by the defendant?”

The case was tried in the lower Court upon these two issues alone. The Subordinate Judge was of opinion that notice of foreclosure had been properly served on the auction-purchasers; but he held that the suit ought to have been instituted within twelve years from the commencement of the defendants' possession which he found to be *bonâ fide* and without notice of the mortgage. He considered that the case was governed by the decision of the Privy Council in *S. M. Anand Mayi Dasi v.*

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Dharandra Chandra Mookerjee (1), and dismissed the suit as barred by the Law of Limitation.

Both the plaintiff and the defendants appealed to the High Court; the former on the question of limitation, and the latter on that of service of the notice of foreclosure.

Baboo *Gopal Lal Mitter*, for the plaintiff, contended that the case relied upon by the lower Court had no application to the present suit. That case, as well as the case of *Brajanath Kunda Chowdhry v. Khilatchandra Ghose* (2), was founded upon an English mortgage. The principle there enunciated can have no application to *mofussil kat-kobalas*. Limitation cannot bar the plaintiff's suit, inasmuch as the right to possession under the conditional sale did not accrue until the foreclosure proceedings had taken place—*Buddinath Paul v. Raja of Burdwan* (3). A new cause of action arose upon the foreclosure proceedings being instituted, though those proceedings were unsuccessful. Besides, strictly speaking, before those proceedings, the plaintiff had no cause of action, inasmuch as the possession of the defendants was not adverse.

Baboo *Bhoyrub Chunder Banerjee*, *Tarucknath Dutt*, and *Rashbehary Ghose*, for the defendants, submitted that the lower Court was right in holding that the plaintiff's suit was barred. The principle enunciated by their Lordships in the Privy Council applies to all cases in which the mortgagee seeks for possession as against *bonâ fide* purchasers without notice. The foreclosure proceedings between the date of suit and the purchaser's possession did not give the plaintiff a fresh cause of action.

Baboo *Gopal Lal Mitter* in reply.

The following judgments were delivered :—

MARKBY, J. (after stating the facts and pleadings continued) :—I deem it convenient first to dispose of the questions of fact which have been raised before us in the appeal.

(1) 8 B. L. R., 122; S. C., 14 Moore's I. A., 101.

(2) *Id.*, 104; S. C., 14 Moore's I. A., 144.

(3) 13 S. D. A., 1857, 1816.

It has been contended for the plaintiff that notice of the mortgage is proved to have been given to the purchasers, but I see no reason to differ with the finding of the Subordinate Judge upon that point. All that is proved is, that Mr. Gillanders, the attorney of the mortgagee, wrote and sent to the Sheriff this letter (reads letter set out, *ante*, p. 88). From this we are asked to presume that the Sheriff gave notice of the mortgage at the time of sale. I do not think it safe to presume this: there is no evidence whatever of the practice of the Sheriff's office in this respect.

With respect to the service of notice of foreclosure, I think there is no ground for disagreeing with the Subordinate Judge as to the service of notice in due form upon Nursing Dass and the other purchasers of Cossimpore. Even if the answers of Nursing Dass cannot be treated (as the Subordinate Judge would treat them) as an admission of service of notice, they certainly are not as clear and explicit a denial as I should expect. On the other hand, I think, the evidence of Subeeroodeen, the *piada*, who served the notice, is reliable. Of course, it is not improbable that he should forget having served this notice; but, I think in a matter of this kind, the report which he made in the usual course of business to the Nazir, and which he swears to be a true report, may be looked at. This report is on the record, and should have been inserted in our printed book; and it appears from the Nazir's evidence (which is also on the record, and should also have been printed), that it was made according to the usual course of business in the office. I think, therefore, that in the absence of any very satisfactory contradiction, we may assume that a copy of the notice of foreclosure was affixed to the door of the house, together with a copy of the application; that the requirements of s. 8 of Regulation XVII of 1806 have been thereby complied with; and that, therefore, the foreclosure proceedings, as against the purchasers of Cossimpore, have been regularly taken.

With regard to the purchasers of Nowpara, I think it is proved that the notice of foreclosure was delivered at the house of Grish Chunder Banerjee, the auction-purchaser, but I can find no proof whatsoever that the notice was accompanied by a copy of the application to the Judge as required by s. 8 of the above

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Regulation. The words of the Regulation are express that the Judge shall cause the mortgagor or his representative to be served with a copy of the application ; and it has been, I believe, always considered that proceedings in foreclosure are not regular, unless a copy of the application accompanies the notice ; see the Constructions of the Sudder Dewany Adawlut, No. 644, June 24th, 1831, (1). It was said that it was altogether unnecessary that this should be done, and that in fact all the information which the purchasers could make any use of was given by this notice. But I do not feel justified in saying that the mortgagor or his representative loses his right of redemption when one of the formalities expressly required by the Regulation has not been fulfilled.

Upon the evidence, I do not think it possible to hold that a copy of the application was served with the notice. The notice recites that a copy of the application (in the notice called the petition) was sent therewith. But in the order of Phear, J., in the return of the Sheriff, and in the deposition of Krishto Roy, only a notice is mentioned ; and, according to the practice of this Court on the Original Side, had the application accompanied the notice, it would have been so mentioned in the order of Phear, J., and the return of the Sheriff.

It seems to me, therefore, that if it be necessary for the plaintiff's case to show, as against the purchaser of Nowpara, that the mortgage had been foreclosed, this has not been done.

It remains to consider whether the suit should have been dismissed, as against all the defendants, on the ground of the Statute of Limitation. I will first take the case of the purchasers of Cossimpore ; and as regards these defendants, the case stands in precisely the same position as it did before the Subordinate Judge. These persons acquired their title by a purchase in good faith without notice of the mortgage ; they were in possession for more than twelve years prior to this suit, but within twelve years of their purchase proceedings for foreclosure were duly taken, and within the twelve years the year of grace expired.

In the case in the Privy Council (1) upon which the Subordinate Judge relied, the real facts were wholly different from the present case. The Privy Council however, expressed their opinion as to what would be the effect of the Statute of Limitation, if the facts had been such as one of the parties unsuccessfully asserted them to be. These hypothetical facts were, that a purchaser at a sale in execution of a decree against a mortgagor had got into possession and remained in possession for twelve years before the suit was brought. That is also the case here, but there is this distinction, that in the hypothetical case, which was being dealt with by the Privy Council, it is assumed that no proceedings by way of foreclosure had been taken against the purchaser; where as in the case with which I am now dealing (that of the purchasers of Cossimpore) such proceedings have been taken.

The same distinction may be drawn between this present case, so far as it relates to the defendants, who are the purchasers of Cossimpore, and the later decision of the Privy Council in *Brajanath Kundu Chowdhry v. Khilatchandra Ghose* (2), where also no proceedings by way of foreclosure had been taken which were effectual against the mortgagor. The only other difference which was suggested on the argument between these two cases in the Privy Council and the case of the purchasers of Cossimpore is, that in the second, and apparently in the first also, of the cases before the Privy Council, the mortgage was in the English form, and not in the form of mortgage under which the plaintiff here claims. In the two cases to which I have referred, the suit against the purchaser, who had been twelve years in possession, was held to be barred; so that, as regards the purchaser of Cossimpore, our decision will depend upon how far these two distinctions affect those decisions.

Now, in order to enable us to appreciate the value of these distinctions, we must consider what the law of limitation is as applicable to a mortgagee seeking to recover possession of the mortgaged property. It is sufficient to advert to the law as laid

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(1) *S. M. Anand Mayi Dasi v. Dharandra Chandra Mookerjee*, 8 B. L. R., 122; S. C., 14 Moore's I. A., 101.

(2) 8 B. L. R., 104; S. C., 14 Moore's I. A., 144.

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down by Act XIV of 1859, which governs the present suit. The only provision in that Statute which is applicable is that contained in s. 1, cl. 12, which provides that in suits for the recovery of immoveable property, the suit should be instituted within twelve years from the date when the cause of action arose.

Now the cause of action would arise when two things have concurred: that the plaintiff had a right to possession, and that the defendant was holding possession not permissively and acknowledging the plaintiff's right, but relying upon his own right, or adversely as it is called. If the plaintiff had not a right to immediate possession, or if, having a right to possession, the defendants were holding with the plaintiff's permission and acknowledging his right, no suit could be brought, in the one case because the right to possession had not accrued, and in the other because it had not been disturbed or denied. Now it has been contended for the plaintiff that under a conditional sale in this form, no right of entry accrued until foreclosure, but it seems to me impossible to hold that consistently with the provisions in the deed which is before us, and which is operative except so far as the Regulations of 1793 and 1805 prevented its being so. The deed recites that the mortgagor had received Rs. 25,000; that the net annual profits of the property are Rs. 3,000; that in liquidation of the interest, the mortgagee is to receive that amount from the ijardar under the mortgagor; that the money borrowed, is to be repaid on the 26th Assar 1262 (9th of July 1855), and then follows this clause:—"If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true and absolute bill of sale; my and my successors' rights will cease to the said zemindari; the proprietary rights, with the rights of gift and sale to it, will accrue to you and your successors, and registering your names in the sarishta of the Collectorate, you will take possession of it in the mofussil; and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof."

Now the law has provided that if the mortgagee take possession, he is accountable to the mortgagor for the profits which he has received; the law has also provided that if

the mortgagor desire to redeem the property, he may do so within the period specified in the Statutes of Limitation, unless the mortgagee shall in the meantime have taken proceedings for foreclosure; and the effect of these provisions is no doubt greatly to curtail the rights which the mortgagee has stipulated for. But one of the rights here expressly stipulated for is the right to possession and the law has nowhere provided that this right shall not be exercised by the mortgagee. There is, indeed, a case in which it appears to be laid down that the mortgagee under a conditional sale has no right of possession until foreclosure—*Buddinath Paul v. Raja of Burdwan* (1); but I cannot reconcile that with the two decisions of the Privy Council to which I have referred. In both these cases the property was situate in the mofussil, and it would, I think, be impossible to hold that the mortgagee of property in the mofussil under a mortgage in the English form had a right to the possession, and a mortgagee by conditional sale had not. In both cases the mortgagee has contracted for the possession at a certain date; and therefore, if he is debarred from his right to possession, it must be by reason of the Regulations. But the Privy Council has given a construction to the Regulations, which is that they do not debar the mortgagee from possession, if he has stipulated for it, after default; but, on the contrary, on default the right of entry immediately accrues. It seems to me, therefore, that the first distinction relied on avails nothing, and that the plaintiff under this deed of conditional sale, had the same right of entry after default, as the mortgagees had in the two cases decided by the Privy Council.

But it is said that even if the plaintiff had a right to possession, he had no cause of action, because the possession of the purchasers was not adverse. This argument is, I think, also answered by the observations of the Privy Council in *Anand Mayi Dasi v. Dharandra Chandra Mookerjee* (2); where it is said:—"Their Lordships think that the title of a judgment-creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a mortgagor, or of a person

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(1) 13 S. D. A., 1857, 1816.

(2) 8 B. L. R., 122; see p. 127; and 14 Moore's L. A., 101; see p. 311.

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claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser, under such circumstances, is really not the possession of a person holding in priority of the mortgagor—(this is so printed in all the books: *quære*—whether it should not be ‘in privity with the mortgagor’ 1)—or holding so as to be an acknowledgment of the continuance of the title of the mortgagee. The possession which the purchaser supposed he acquired, was a possession as owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute owner.”

That was a judgment upon the earlier Regulations. But in *Brajanath Kundu Chowdhry v. Khilatchandra Ghose* (2), a case under Act XIV of 1859, it is said of a purchaser under similar circumstances “that it is impossible to hold that the defendant, the purchaser, was holding, or supposed that he was holding, by permission of the mortgagee: and when both things concur,—possession by such a holder for more than twelve years, and the right of entry under the mortgage-deed more than twelve years, old,—it is impossible to say that such a possession is not protected by the Law of Limitations.”

I think, therefore, that there was a complete cause of action against the purchasers of Cossimpore on the 9th July 1855; and that a suit founded upon that cause of action was, therefore, barred when this suit was brought.

But it is said, and was pressed strongly upon us by Baboo Gopal Law Mitter in his very able argument for the appellants, that an entirely new cause of action arose when foreclosure became absolute by the expiry of the year of grace. Now, at first, I was inclined to think that some of the decisions in India favored this contention, but upon a careful examination of all the cases quoted and some others, I am satisfied that, whilst there are some decisions expressly against it, there is no decision which countenances it. The doubt has been, not whether the mortgagee is wholly barred when twelve years have elapsed from the time when his cause of action first accrued, but when it can be

(1) The judgment, as printed in 8 B. L. R., contains the reading suggested by the learned Judge.

(2) 8 B. L. R., 104; see p. 109; and 14 Moore's I. A., 144; see p. 150.

first said that he has a cause of action. It has nowhere been said that upon foreclosure the mortgagee has a new cause of action, but it has been doubted in some cases whether before foreclosure he had any cause of action at all. This was the ground of the decision in favor of the mortgagee in the case of *Buddinath Paul v. Raja of Burdwan* (1). The Court there says:—"The mortgagee's right to possession of the property does not become complete, till he has performed certain acts prescribed by law; consequently, as the mortgagee's right to sue to enforce the conditions of his bond, is not complete till those acts have been carried out, the date of his cause of action must be considered to arise from the time when those acts are completed, and not from the date when the money becomes due. The law moreover does not compel a mortgagee to complete his right within any fixed period." Clearly here the Court thought that in that case there was no right of entry at all until foreclosure. So, too, in the case of *Buldeen v. Mussamat Golab Koonwer* (2), decided by a Full Bench of the High Court of the N. W. P. on the 3rd June 1867. The Court say:—"We cannot concur in the rule which has been laid down in some of the authorities cited to the effect that, as a mortgagee's cause of action arises on the mortgagor's making default, the mortgagee's suit for possession must be instituted within twelve years from the date of default with allowance for the year of grace, when foreclosure proceedings are instituted at the earliest possible date. A default may be made by the mortgagors, which may give the mortgagee a right to sue or to enter into possession (if he chooses to assert such right), but which may notwithstanding have no effect whatsoever in altering the nature of the mortgage title. So long as the mortgagor in possession, or those who claim under him, assert merely a title to redeem, and advance no other title inconsistent with it, such possession must, *prima facie* at least, be treated as perfectly reconcileable with, and not adverse to, the title of the mortgagee, and the continuation of the lien on the property pledged."

But this was a suit not between the mortgagee and a purchaser from the mortgagor, but a suit between the mortgagee and the

(1) 13 S. D.A., 1857, 1816.

(2) Agra F. B. Bul. for 1866-67, 102.

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mortgagor herself. There might, therefore, well be reasons for holding that the possession of the mortgagor was not adverse; and it appears that the Courts below had not found that it was so. But so far from saying that if the possession prior to the foreclosure had been adverse, a new cause of action would arise upon foreclosure, the High Court remanded the case with directions which seems to me inconsistent with this view. They say:—"It will be for the Courts to consider the effect of the whole evidence, and whether it tends to show a possession by the mortgagors for any and what number of years adverse to, and inconsistent with, the alleged mortgage title. It is well settled that foreclosure proceedings under the Regulations give no efficiency to transactions not in themselves valid. If there was really no mortgage, the mortgagees having never advanced the money, or if the mortgagors have repudiated the mortgagees' right, and have held adversely to them and without recognition of their title for twelve years, they can derive no benefit whatsoever in this suit from the foreclosure proceedings. The mortgagors are entitled to put them to the proof of a valid and existing mortgage title at the time of foreclosure, and that such title has been finally and duly foreclosed. If such a title is proved, this suit to recover possession is brought within the limited time." And the suit was accordingly remanded. But if foreclosure gives a new cause of action, there was no necessity to remand the suit at all, for the proceedings in foreclosure had only been recently taken.

The case of *Prannath Roy Chowdry v. Rookea Begum* (1), is also consistent with the view that no new cause of action arises upon foreclosure. It was held in that case that the suit of the mortgagee was not barred; but the ground of the decision is stated at p. 354. After observing that it cannot be laid down as a rule universally true that under Regulation III of 1793, s. 14, a mortgagee is barred after twelve years from the date of redemption fixed by the deed, the Privy Council say:—"The possession of those who claim under the mortgagor so long as they assert a title to redeem, and advance no other title inconsistent with it, must, *prima facie* at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the con-

(1) 7 Moore's I. A., 323.

tinuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes, be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality." The Privy Council then, after observing that "it by no means follows, as a consequence, that a mortgagee foreclosing will be able, in a suit for possession, to make good against all occupants a title to possession," proceed to enquire whether the mortgagee's title to enforce possession was barred. But this enquiry would have been wholly unnecessary if the proceedings in foreclosure gave a new cause of action; for the mortgage in that case was not finally foreclosed until the 25th June 1849, and the suit for possession was brought immediately afterwards.

The decisions which lay down directly that a mortgagee is barred altogether after twelve years' adverse possession are, *Insan Rai v. Narain Dass* (1) *Nilambur Mujoomdar v. Parbuttee Churn Mujoomdar* (2), and *Jankee Pershad v. Hurnarain* (3), where also previous cases of the like nature are referred to.

So too, if foreclosure gave a new cause of action, the law of limitation would be thrown into much confusion. No safe title could ever be acquired against a mortgagee in the mofussil: for, as to mortgages in the mofussil, no time is prescribed for taking proceedings in foreclosure, and the provision contained in s. 6, Act XIV of 1859, would not (as is generally supposed) be an exception to the general law in favor of the mortgagee, but it would be a restriction upon the rights of the mortgagee in favor of the parties in possession. This is certainly not the view taken by the Privy Council of this section in the case of *Brajanath Kundu Chowdhry v. Khilatchandra Ghose* (4). The Privy Council clearly treat this provision as an exception made in favor of the mortgagee, and consider that where this exception does not apply, the only resource for the mortgagee would be to prove that the possession of the mortgagor or his assignees had not been adverse.

(1) S. D. A. (N.W.P.), 1853, 100.

(2) *Id.*, 1859, 1495.

(3) *Id.*, (N.W.P.), 1854, 234.

(4) 8 B. L. R., 104; S. C, 14 Moore's L. A., 144.

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It seems to me, therefore, that upon the whole there is nothing in the decided cases to warrant us in holding that a new cause of action arises upon foreclosure.

It has been contended that the mortgagee is at any rate not barred if he commences foreclosure proceedings within twelve years of the date when the possession first became adverse, and brings his suit for possession within twelve years of the expiration of the year of grace. No doubt, this suggestion avoids some of the inconveniences which would arise if the right of the mortgagee to foreclose, and take possession, were wholly unlimited. But it does not seem to me to rest on any foundation in law. If foreclosure does give a new cause of action, the question whether foreclosure took place within twelve years of default will be immaterial. If on the other hand it does not, then the operation of the Statute can only be prevented by the institution of a suit. But to take proceedings in foreclosure, in the mofussil at any rate, cannot be called the institution of a suit. There is no writ of summons, the mortgagor and his representatives are not summoned and cannot be heard, and the action of the Court is purely ministerial. Such a proceeding cannot be called the institution of a suit within the meaning of Act XIV of 1859 without a straining of language for which I see no justification.

I have considered this case with reference only to the provisions of the Statute Law and the decided cases, and not upon any general principles. The relation of mortgagor and mortgagee, being the result of an interference by the Legislature with the expressed intention of the parties, is an anomalous one, and therefore a deduction from general principles cannot always be safely made with regard to it. It is for this reason that I have not considered when the mortgagee becomes the owner of the property mortgaged. It seems to me that where the relation between the parties is so anomalous, it is impossible to fix this date, so as to justify any conclusion from it upon the matter now under enquiry. If it be said that the mortgagee only becomes owner of the property after the expiration of the year of grace, and not before, still I do not think he can be said to acquire the property at that date, and thus to acquire a new title to possession.

The result is that as regards the purchaser of Cossimpore I hold first, that upon default of the payment of the mortgage debt, the mortgagee had a right to possession ; second, that the possession which these purchasers obtained upon their purchase was not held by them under the permission of the mortgagee, but as absolute owners ; and, third, that no cause of action arose upon completion of the foreclosure proceedings. I therefore hold that the purchasers of Cossimpore can successfully set up the bar of limitation.

With regard to the purchasers of Nowpara, they stand in a somewhat more favorable position than the purchasers of Cossimpore. As against them the mortgage has not been foreclosed. The question, therefore, as to whether any new cause of action arises upon foreclosure has no bearing upon the suit as against them ; *a fortiori* therefore, as against them the suit is barred.

The result is that in my opinion the decree of the Subordinate Judge dismissing the suit should be affirmed, and the appeal dismissed with costs.

MUTTER, J.—I concur in holding that the decree of the lower Court ought to be affirmed with costs. Out of the many issues which arose from the allegations of the parties to this suit, the decision of the lower Court mainly dealt with two of them only, viz., (i), whether or not notice of the foreclosure had been regularly served ; and (ii), whether or not the plaintiff's suit was barred by limitation ? The lower Court has decided the first of these issues in favor of the plaintiff, and the second against him, I propose to consider the second question first.

The *kut-kobala*, or the conditional bill of sale, on which this suit is based, was executed on the 27th Srabun 1260 (10th of August 1853), and the amount taken upon it was promised to be repaid on the 26th Assar 1262 (9th of July 1855). The rights and interests in the mortgaged premises of Sookhomoney Dossee, who executed this document, were sold at a Sheriff's sale in the execution of a decree of the Supreme Court of Calcutta on the 18th December 1856, and purchased by the ancestors of some of the defendants in this case ; and ever since their purchase they

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and their heirs have been in possession. The plaintiff alleges that he has acquired the entire rights of the original holders of this *kat-kobala* by purchase, and that he has caused the notices of foreclosure to be served upon all the defendants, and that the year of grace has expired on the 23rd of August 1868.

For the purposes of the adjudication of this issue, I shall assume that all these allegations of the plaintiff have been proved, although the defendants have joined issue with him upon every one of them. The material portion of the deed of conditional sale which bears upon this question is the following :—" If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true and absolute bill of sale ; my and my successor's rights will cease to the said zemindari ; the proprietary rights, with the rights of gift and sale to it, will accrue to you and your successors, and registering your names in the *sarrisht* of the Collectorate, you will take possession of it in the *mofussil* : and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof."

The first question that arises in determining this issue is, when did the cause of action in this suit arise. The plaintiff contends that it arose on the expiry of the year of grace, and if that contention be correct, the suit having been instituted within twelve years from that time is not barred by limitation. But I do not think that this contention is correct. From the terms of the conditional sale set forth above it is evident that on default of payment within the stipulated time the mortgagee was entitled to take possession of the properties sold, unless restrained by any legislative enactment. It is said that he was so restrained by Regulation XVII of 1806. This argument entirely proceeds from a misapprehension of the provisions of that Law. It is quite clear that parties are adversely bound by the terms of their contract, unless by legislative interference one or both of them are set at liberty to modify or annul any of its provisions to which they have mutually consented. The *kat-kobala* in question expressly reserves to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time : Regulation XVII of 1806, or any other Law,

does not render such a stipulation inoperative between the parties. I am therefore of opinion that the mortgagee in this case, immediately on default of payment, which occurred on the 9th of July 1855, was entitled to take possession of the properties mortgaged. Whatever distinction there may be between this case and the Privy Council decision in *Brajanath Kundu Chowdhry v. Khilatchandra Ghose* (1), it is an authority in support of this conclusion, *vis.*, that there is no legislative bar to the exercise of this right of entry by the mortgagee; therefore it is clear that the right to assume possession of the properties in dispute accrued to the mortgagee so far back as the 9th of July 1855, and unless the plaintiff can make out that his present suit for possession is not based upon that right, but upon some other right which came into existence at a more recent period, and within twelve years, his suit must fail as barred by limitation.

Baboo Gopal Lal Mitter, with some plausibility, has urged that the plaintiff is not now suing for possession on the right of entry which had accrued to the mortgagee on the 9th of July 1855, but upon the right which arose on the day the sale became absolute, the mortgagors not having repaid the mortgage debt within the year of grace allowed by Regulation XVII of 1806. He further contends that, conceding that the mortgagee in this case might have assumed possession immediately after the default in payment had been made, still that possession would have been as a mortgagee, and the plaintiff now seeks to recover not as mortgagee but as absolute owner; therefore the present suit is not based upon the right of entry given by the conditional bill of sale, but upon the right to possession which is a necessary incident to the right of absolute ownership which has been vested in the plaintiff by the foreclosure proceedings. But is it a correct proposition to assert that a holder of a conditional bill of sale invariably acquires an absolute right to the mortgaged premises as soon as the proceedings laid down in Regulation XVII of 1806 (usually called foreclosure proceedings) have been duly carried out? If it is not, the whole argument must fail. I do not think that this proposition is universally correct. The effect of the proceedings laid down in the

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(1) 8 B. L. R., 104; S.C., 14 Moore's I. A., 144.

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Regulation in question is simply to bar the right of redemption. That is to say, when the right of ownership in a particular property is divided between two persons standing to each other in the relation of mortgagee and mortgagor, these proceedings, when duly carried out, have the effect of terminating the right of the one, viz., of the mortgagor, and perfecting that of the other, viz., of the mortgagee. But this presupposes the existence of valid and subsisting rights in both of them, and these proceedings are quite ineffectual when this is not the case. For example, under Act XIV of 1859, which is the Law of Limitation governing this case, the mortgagor's right of redemption is barred after the lapse of sixty years from the date of the mortgage; see s. 14 cl. 15. In a case where a mortgagee has been in possession for more than sixty years of the mortgaged property, it is not necessary for him to have recourse to foreclosure proceedings. On the other hand where the rights of a mortgagee have been extinguished by lapse of time these proceedings, if taken by him, would be quite ineffectual. Therefore if, on the day of the expiry of the year of grace, a valid subsisting right of a mortgagee exists in a holder of a *kat-kobala*, the omission of the borrower to repay the mortgage loan before that date has the effect of transferring the remaining rights of the latter to the former, who acquires from that date absolute ownership in the property mortgaged. But if, on the other hand, the mortgage rights of a holder of a *kat-kabala* have been extinguished by lapse of time or other causes previous to that date, the foreclosure proceedings, even if duly carried out, are entirely ineffectual, and do not affect any person's right in the least. This view of the law is supported by the following observation which occur in a Full Bench decision of the High Court, North-Western Provinces (1):—"If there was really no mortgage, the mortgagees having never advanced the money, or if the mortgagors have repudiated the mortgagees' rights, and have held adversely to them, and without recognition of their title, for twelve years, they can derive no benefit whatever in this suit from the foreclosure proceedings."

(1) *Buldeen v. Musst. Golab Koonwer*, Agra F. B. Rul. for 1866-67.

102; see p. 108.

Let us see what are the facts of this case connected with this question. I find that the mortgagee's right to demand possession accrued on the 9th July 1855. It is not shown that since that date possession has not been withheld from him "in breach of the contract ;" it is not suggested—far from being proved—that the original mortgagors and the subsequent purchasers have been allowed to remain in possession with the mortgagee's consent, either express or tacit ; notices of foreclosure are alleged to have been served upon one set of defendants in December 1866, and on the other set of defendants in February 1867 : therefore, before the expiry of the year of grace in either case, i. e., on 9th of July 1867, all rights of the mortgagee had been extinguished by lapse of time. In this view of the law I hold that the plaintiff is not entitled to a fresh start from the date of expiry of the year of grace, and his present claim is therefore barred by limitation.

With respect to the other issue, I agree with my learned colleague, for the reasons given by him, in holding that the service of notice upon the defendants has been proved, but that the plaintiff has failed to establish that the notice upon Grish Chunder Banerjee was accompanied by a copy of the application to the Judge as required by Regulation XVII of 1806, I am also of the opinion that this omission has the effect of rendering the foreclosure proceedings against the heirs of Grish Chunder Banerjee, invalid and ineffectual.

Appeal dismissed

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APPELLATE CRIMINAL,

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Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Phear, and Mr Justice Morris.

QUEEN v. GERALD MEARES.*

Jurisdiction—European British Subject—Criminal Procedure Code, Act X of 1872—24 & 25 Vict., c. 104, s. 9—26 Vict., c. 67 (Indian Councils Act), ss. 22 & 42—Letters Patent, 1862, cl. 21—Letters Patent, 1865—34 & 35 Vict., c. 34.

A European British subject in the mofussil was convicted by a Magistrate under the provisions of Ch. vii of Act X of 1872. He appealed to the High Court on the ground (*inter alia*) that the Magistrate had no jurisdiction to try the case. inasmuch as the Governor General in Council had not the power under 24 & 25 Vict., c. 67, to subject a European British subject to any jurisdiction other than that of the High Court, and therefore the provisions of Act X of 1872 under which the prisoner had been tried were *ultra vires* and illegal. *Held* that the jurisdiction of the High Court as given by the Letters Patent is subject to the legislative powers of the Governor General in Council, and therefore the Magistrate had jurisdiction to try the case.

The prisoner Gerald Meares, a European British subject, was convicted by the Magistrate of Jessore of the offence of causing hurt without grave or sudden provocation to one Panchoo, and was sentenced to two months' rigorous imprisonment. From this sentence the prisoner appealed to the High Court under the provisions of s. 79 of the Criminal Procedure Code, Act X of 1872. Objection was taken to the conviction on the ground, amongst others, that the Magistrate had no jurisdiction to try the case.

The case came on for hearing before Phear and Morris, JJ., who differed in opinion on the merits, and the case was re-argued before the Chief Justice and Phear and Morris, JJ.

Mr. Lowe and Mr. Evans for the appellant.

The Junior Government Pleader (Baboo Juggadanund Mookerjee) for the Crown.

* Criminal Appeal, No. 101 of 1874, from an order passed by the Magistrate of Jessore, on the 29th June 1874.

Mr. *Lowe* contended that the case against the appellant was not made out by the evidence.

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Mr. *Evans* on the same side.—The High Court has exclusive jurisdiction over Her Majesty's European subjects. The provisions of Act X of 1872, Ch. vii, by which the Governor General in Council has given jurisdiction to Magistrates who are also Justices of the Peace over European British subjects, were *ultra vires*. The Indian Councils Act (24 & 25 Vict., c. 67) vests the Governor General in Council with legislative powers over all India, but s. 22 of that Act expressly provides that he shall not have the power to pass any Law or Regulation which shall affect the provisions of any Act passed in the same session with the Indian Councils Act. The Charter Act (24 & 25 Vict., c. 104) establishing the High Court was passed in the same session with the Indian Councils Act. S. 9 of this Act provides that the High Courts established under it shall exercise all the powers possessed by the abolished Courts subject only to the provisions of the Letters Patent. Cl. 21 of the Letters Patent of 1862 provides that the High Court "shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and in respect of all persons beyond such limits over whom the said Supreme Court at Calcutta now has criminal jurisdiction." This is a substantive part of s. 9 of the Charter Act.

The Governor General in Council is, therefore, prevented by the very Act which vested him with legislative powers over all India, from making any law or regulation affecting the exclusive jurisdiction of the High Court over European British subjects, which it has received from the old Supreme Court. That the Imperial Legislature never intended, the Governor General in Council to have the power to derogate from the exclusive jurisdiction of the High Court, appears from the circumstances which followed upon the decision in the case of *Reg v. Beay* (1). In that case the conviction was set aside by the High Court of Bombay, who held that the Bombay Act VII

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of 1867 under s. 31 of which the prisoner had been convicted, was *ultra vires*, the Governor in Council having no power to pass any measure by which the exclusive powers of the High Court, among them the jurisdiction which the said Court possessed through the Supreme Court over Her Majesty's European British subjects. In consequence of this decision the Supreme Government passed a special Act in order to remedy the defect. Act XXII of 1870 declared that the Acts passed by the Local Governors in Council making British European subjects liable to tribunals other than the High Courts, shall be deemed as valid as if such Acts were passed by the Governor General of India in Council. But there were strong doubts whether the Governor General had the power to pass any law, declaring such Acts to be valid; and accordingly the Imperial Legislature was called upon to confirm them as valid by 34 & 35 Vict., c. 34. [COUCH, C.J.—That Act was passed merely to make the powers of the Local Governors co-extensive with those of the Governor General]. It provides simply for the extension of the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Councils Act, 24 & 25 Vict., c. 67, s. 42. There is no mention here that the legislative powers of the Local Governors in Council shall be co-extensive with those of the Governor General of India in Council so far as the jurisdiction of the High Court is concerned. The Governor General had not the power of making any law which might effect the jurisdiction of the High Courts nor could he declare that the Local Governors in Council should have the power which he had not. The Imperial Legislature conferred this power on the Local Governors to meet a special need. The powers of the Governor General in Council remained as limited as before. The provisions of Act X of 1872, Ch. vii, by which the Governor General in Council has vested Magistrates, who are also Justices of the Peace, with jurisdiction over Her Majesty's European British subjects, are therefore *ultra vires*. I submit, therefore, that the conviction is bad and ought to be quashed.

The Junior Government Pleader (Baboo Juggadanund Mookerj)

jee), on behalf of the Crown, contended that the conviction was proper and legal, inasmuch as it was preposterous to suppose that the Imperial Legislature should vest the Local Governors with the powers which it denied to the Governor General. Besides, cl. 44 of the Letters Patent 1865, expressly declares that all the provisions of the Letters Patent were to be subject to the legislative powers of the Governor General in Council. Hence, if there was any defect, it has been cured, and the powers of the High Court have become subject to the legislative powers of the Governor General. The provisions of Act X of 1872 are perfectly valid, and the conviction under that Act proper and legal.

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Mr. Evans in reply.

Cur. adv. vult.

The Judges differed in opinion on the merits of the case. Morris, J., being of opinion that the conviction should be quashed, and Couch, C. J., and Phear, J., that it should be upheld.

MORRIS, J. (after giving his decision on the evidence, said as to the point of jurisdiction):—In the view which I take on the merits, it is unnecessary for me to say more on the question of jurisdiction that has been raised than that, in my opinion, the Magistrate had jurisdiction to try the case.

COUCH, C. J. (PHEAR, J. concurring.)—Before giving my opinion as to whether the conviction ought to be reversed, I will dispose of the question of the jurisdiction of the Magistrate.

By the Indian Councils Act, 1861 (24 & 25 Vict., c. 67), s. 22, it is provided that “the Governor General in Council shall have power at meetings for the purpose of making laws and regulations, and subject to the provisions therein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever then in force, or thereafter to be in force in the Indian territories then under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for

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all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominion of Princes and States in alliance with Her Majesty."

These words are as general as they can well be, and undoubtedly gave to the Legislative Council of the Governor General power to make laws for all Courts of Justice, including the High Court, and for all persons, whether British or native. It is then provided that the Governor General in Council should not have the power of making any laws or regulations which shall repeal, or in any way affect any of the provisions of that Act or any provisions of certain other Acts which are named, or of any Act passed in that session of Parliament, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof.

Now the Act for establishing the High Courts was passed in the same session of Parliament; and the question is whether the provisions in the new Criminal Procedure Code giving jurisdiction to Magistrates over European British subjects come within the words "affecting the provision of any Act" passed in the session of Parliament in which the Indian Councils Act was passed. The 9th section of 24 & 25 Vict., c. 104, the Act for establishing High Courts of Judicature in India, provides that "each of the High Courts to be established under the Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may, by Letters Patent, grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and

authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the Act at the time of the abolition of such last mentioned Courts." Accordingly to the grammatical construction of this section, the words "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council" apply to the provision that the High Court shall have and exercise the jurisdiction of the Supreme Court which was abolished under the Act. They do not apply to the former part of the section. The question then arises whether the provisions in the Letters Patent as to the jurisdiction of the High Court are to be considered as provisions of the Act and therefore coming within the proviso which I have read, that the Governor General in Council should not have the powers of making any laws or regulations which should repeal, or in any way affect, any of its provisions. Now the Letters Patent which were issued after the passing of this Act, provide in the 21st clause that the High Court shall, in respect of all persons beyond the limits of its ordinary original civil jurisdiction, have the jurisdiction which the Supreme Court at Calcutta then had. The Letters Patent did no more than would have been done by the latter part of s. 9, if they had been silent as to the jurisdiction beyond the local limits of the ordinary original jurisdiction.

If Her Majesty had said nothing about the jurisdiction beyond those limits, the jurisdiction of the High Court over European British subjects would have been given by the Act by the words which say that the High Court shall have and exercise all jurisdiction which was vested in the abolished Courts; and by the very words of s. 9, if that had been the case, the jurisdiction over European British subjects would have been subject to the legislative powers of the Governor General in Council. It appears to me to be unlikely that the Legislature intended that if the jurisdiction was given by the Letters Patent, it should not be subject to the legislative powers of the Governor General in Council, and could only be altered by an Act of the Imperial Legislature but if the Letters Patent omitted to mention it, and it was given by the High Court's Act itself, that it should be subject to those legislative powers. That appears to me to

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be unlikely : still if we gather from the Act that this was the intention, and it appears plainly to be so, we should be obliged to give effect to it. After consideration of this question, I think that the meaning of the words "any provisions of any Act passed in the present session of Parliament, or hereafter to be passed," is provisions in the Act itself. For instance, there is the qualification of the Judges of the High Court. The Governor General in Council has not power to make an alteration in that. There is an express provision of the Act upon the subject. So also in s. 15, there is a provision giving to the High Court superintendence over the Courts which are subject to its appellate jurisdiction. That again is a provision in the Act which cannot be affected or altered by the Governor General in Council. But I am of opinion that the words "provisions in the Act" do not apply to what is not in the Act itself, but only in the Letters Patent which the Act authorizes to be issued, and which can only be said to be a "provision of the Act" by relation—by what is rather a forced construction, namely, that as the section says that the Courts shall have all the jurisdiction which shall be given by the Letter Patent, whatever is given by them, becomes fixed, and is in the same state as if the words in the Letters Patent had been in the Act itself. I think that was not the intention of the Legislature, and what has occurred subsequently confirms me in that opinion. By s. 42 of the Indian Councils Act, power to make laws and regulations was given to the Governors in Council of the other two Presidencies, and it was provided that they should not "have the power of making any laws or regulations, which shall in any way affect any of the provisions of that Act, or of any other Act of Parliament in force or thereafter to be in force in such Presidency." The difference with respect to them being that they cannot pass an Act, which will affect any Act of the English Legislature in force in India, whereas the Governor General in Council can do so.

Two of the Judges of the High Court at Bombay, in the case of *Queen v. Reay* (1), held that the Legislative Council of

(1) 7 Bom. H. C. Rep., Cr., 6.

Bombay had not power to confer criminal jurisdiction upon Magistrates in the *mefussil* over British-born subjects. One of them considered that the jurisdiction over British-born subjects was given exclusively first to the Recorder's Court, and through that to the Supreme Court, by 37 Geo. III, c. 142, s. 10 and he held that the Act of the Bombay Legislative Council affected the provisions of that Act. The other learned Judge, Sir Charles Sargent, appears to have rested his decision upon the ground that the Act of the Bombay Legislative Council affected the provisions of the High Court's Act. But they both agreed in holding that the Act of the Bombay Legislative Council was void. Upon this an Act was passed by the Legislative Council of the Governor General (Act XXII of 1870). In that it is recited that "the Governors of the Presidencies of Fort St. George and Bombay in Council, and the Lieutenant-Governor of Bengal in Council have severally passed divers Acts purporting to apply generally to all persons within the local extent of the said Acts," and "that doubts have been raised as to the validity of such Acts in so far as they affect to render European British subjects liable to be convicted and punished by tribunals other than the High Courts of Judicature at Fort William, Madras and Bombay, and "for the purpose of removing such doubts," it is enacted as follows:—"Every such Act passed by the Governor of the Presidency of Madras in Council or by the Governor of the Presidency of Bombay in Council, or by the Lieutenant-Governor of Bengal in Council shall, so far as regards the liability of European British subjects to be convicted and punished thereunder, be and be deemed to have been as valid as if it had been passed by the Governor General of India in Council at a meeting for the purpose of making laws and regulations." The Legislative Council of India, doubts having arisen in consequence of the decision of the Bombay High Court as to the power of the local Legislature to make European British subjects liable to be convicted and punished by other tribunals than the High Courts, by declaring those Acts to be as valid as if they had been passed by the Governor General in Council, assumes that it has the power to subject British subjects to a jurisdiction

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other than that of the High Courts. This having been done, but there being still a difficulty as to the further exercise of the power by the Local Legislatures, Act XXII of 1870 only making valid Acts which had been passed, an Act of the Imperial Legislature was passed, namely, the 34 & 35 Vict., c. 34. This recites that "it is expedient that the power of making laws and regulations conferred on Governors of Presidencies in India in Council by the Indian Councils Act, 24 & 25 Vict., c. 67, s. 42, should in certain respects be extended," and it provides in the 1st section that "no law or regulation heretofore made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in manner prescribed by the aforesaid Act shall be invalid only by reason that it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects, as such Governor or Lieutenant-Governor in Council, by Regulations made as aforesaid could have lawfully conferred or could lawfully confer on Magistrates in the exercise of authority over natives in the like cases." Now if it had been supposed by the Imperial Legislature, that the Legislative Council of the Governor General had not the power which it had to alter or affect the jurisdiction over European British subjects, we should expect to find it conferred by this Act, because it cannot be supposed that the Imperial Legislature would give to the Governors in Council of Madras and Bombay a power which it did not intend the Governor General in Council to have. But not only is this not done, but the Act XXII of 1870 of the Governor General in Council is noticed in s. 3, and its validity is recognized by its being provided that the Governors of Madras and Bombay and the Lieutenant-Governor of Bengal in Council shall have power to repeal or amend any of the Acts declared by it to be valid. So there is in this Act, 34 & 35 Vict., c. 34, to my mind a clear recognition of the existence of the power of the Governor general of India in Council to subject European British subjects to a jurisdiction other than that of the High Courts. It appears to me to be a Legislative exposition of the meaning of the words in the Indian Councils Act "provisions of the Act or of any Act hereafter to be passed."

I am therefore of opinion that there was power to make the provisions in the new Code of Criminal Procedure relating to European British subjects.

An allusion was made in the course of the argument to a clause in the second Letters Patent of this Court issued in 1865 by which her Majesty declared that the provisions of that Charter are subject to the legislative powers of the Governor General in Council. It appears to me as I intimated in the course of the argument that this is only a declaration what the law was inserted perhaps for the purpose of clearly showing that the jurisdiction was subject to the Indian Legislature. If the decision of the question depended upon whether Her Majesty had power to make this provision, and to subject the provisions in the Letters Patent to the legislative powers of the Governor General, there would be much greater difficulty in it. But my judgment is not founded upon that. I think it is no more than a declaration of what was the state of the law, and what it would have been whether that clause had not been in the Letters Patent.

Conviction upheld.

PRIVY COUNCIL.

OOLAGAPPA CHETTY (PLAINTIFF) v. D. ARBUTHNOT, COLLECTOR OF TRICHINOPOLY, AND AGENT OF THE COURT OF WARDS, ON BEHALF OF THE MINOR SON OF GUNDAMA RAMAKRISHNA NAIKER AND OTHERS (DEFENDANTS.)

THE COLLECTOR OF TRICHINOPOLY, ON BEHALF OF THE GOVERNOR OF FORT ST. GEORGE (DEFENDANT) v. LEKAMANI, FIRST WIDOW OF THE LATE ZEMINDAR SINCE DECEASED (PLAINTIFF) AND THE ZEMINDAR OF MARUNGAPURI (DEFENDANT.)

PEDDA AMANI AND CHINN AMANI, 2ND AND 3RD WIDOWS OF THE LATE ZEMINDAR, ADMITTED AS PLAINTIFFS AFTER THE DEATH OF LEKAMANI (PLAINTIFFS) v. THE ZEMINDAR OF MARUNGAPURI (DEFENDANT.)

P. C.*
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Nov. 25, 26
&
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Jan. 7, 14,
15, 16,
March 14.

[On appeal from the High Court of Judicature at Madras.]

Unsettled Polliam—Hereditary Tenure—Evidence—Proprietor of Land—Bengal Code of 1793—Proprietary Possession—Madras Regs. XXV and XXXI of 1802—Construction of Statute—Hindu Law—Legitimacy.

The affirmative words of Madras Regulation XXV of 1802, s. 2, the preamble thereto forming no part of the enactment, did not either give to or take away

*Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,
AND SIR B. P. COLLEGER.

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from the former owners of lands not permanently assessed any right, which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The words "proprietors of lands" as used both in the Bengal Code of 1793, and in the Madras Code of 1802, have a technical signification. They refer to "zemindars, independent talookdars, and others, who pay the revenue assessed upon their estates immediately to Government." So also the words "proprietary possession" in the recital of Regulation XXV of 1802, means the possession of a person who is a proprietor according to the technical meaning of the term.

According to the true construction of Madras Regulations XXV and XXXI of 1802, the Legislature recognizes the right of private property, and does not assert a right on the part of Government to deprive or dispose of zemindars in their lifetime, or their heirs after their deaths independently of any considerations connected with the realization of the public revenue. It provides for the protection of the revenue from invalid lakhiraj grants, and for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue.

There is no long uniform current of decisions at Madras sufficient to show that every polliam not permanently settled, is necessary only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it has been held, are matters judicially determinable on legal evidence.

In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a polliam and an ordinary zemindari.

Under Hindu law, it is not necessary in order to render a child legitimate, that the procreation as well as the birth should take place after marriage.

The first of these cases was an appeal from a judgment of the High Court at Madras (Scotland, C.J., and Holloway, J.), dated the 13th May 1870, reversing a decision of the Acting Civil Judge of Madura, dated the 14th April 1869.

Gundama Ramakrishna Naiker, zemindar of Gundama Noika noor, in the district of Madura, contracted a loan from the plaintiff, in order to discharge arrears of Government revenue, and make certain necessary repairs of dams on his estate. In 1863, there was due to the plaintiff the sum of Rs. 29,788, for which he

sued in the Civil Court of Madura. That suit was terminated by a *rasinama*, dated 26th April 1864, which provided for payment by the late zemindar of the sum of Rs. 32,259 by five annual instalments, the plaintiff in default of any one instalment to be at liberty to issue execution for the whole of the unpaid balance against the zemindari. No decree was drawn up in terms of this *rasinama*, it being the practice of the Courts at that time to treat a *rasinama* as equivalent to a decree, and to execute it, as such. When the plaintiff in December 1865 applied for execution thereof, it was refused, owing to a recent decision of the High Court which had ruled that process of execution could not issue on a *rasinama* (1). Accordingly, the plaintiff sued the zemindar on the *rasinama*; and, on his death shortly afterwards, filed a plaint in the Court of the Civil Judge of Madura, upon the same instrument, to recover the sum of Rs. 39,678, being the principal and interest then due on it. To this suit he made defendants the Collector as agent of the Court of wards which held the estate during the minority of the late zemindar's son, the manager of that estate, the appointed guardian of the minor, and the mother of the minor as his natural guardian.

The contention of the Collector was that the zemindari was an unsettled polliam, for which no permanent *sanad* had been granted; and that a *sanad milkiat istimrar* (i.e., *sanad* granting the proprietary right in perpetuity) was necessary in order to constitute a zemindari hereditary property. He submitted that the appointment of a successor to the zemindari depended entirely upon the will and pleasure of the ruling power, which had duly appointed the minor as the successor; and that, as the minor succeeded to the zemindari not of virtue by any hereditary right but by the will and pleasure of Government, the zemindari in his hands was not liable for any portion of the amount secured by the *rasinama* of the late zemindar, who had only a life-interest in the estate.

It was not disputed in this appeal that the debt sued for was *bonâ fide* due by the late zemindar, and that the zemindari was in fact an unsettled polliam.

(1) See *Darbhā Venkuta Sastri v. Vurella Gangaia*, 2 Mad. H. C. Rep., 305.

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The Civil Judge, on the 14th April 1869, upon the ground that the estate had been preserved intact by the loan, which had been contracted for a necessary purpose, in order to prevent the sale of the zemindari for arrears of *pashshah* (revenue), decreed in favor of the plaintiff, and ordered the decree to be satisfied out of the income of the zemindari.

On the 18th May 1870, the High Court at Madras reversed the decree of the Civil Judge, so far as it held that the decree should be satisfied out of the revenue of the zemindari (1).

The decree of the High Court was not appealed from during the six months allowed by law for that purpose. On the 27th April 1871, the High Court of Madras decided the case of *Lekamani v. Srimat Ranga Kristna Mutta Vira Puchaya Nather* (2). There Lekamani, the widow of the late semindar of Marungapuri, which was an unsettled polliam, sued the minor brother of her late husband, and the Collector of Trichintpolly as agent of the Court of Wards which held the estate on his behalf, to recover possession of the estate as next of kin to her late husband. The High Court, contrary to its own ruling in the present case, decided that an unsettled polliam was not necessarily a mere life-estate, which, on the death of each holder reverted to the Government; and that the unsettled polliam of Marungapuri then in dispute was an ancestral hereditary estate which had devolved through several generations in the ordinary course of legal succession. Thereupon, the plaintiff in the present case applied for, and obtained special leave to appeal to Her Majesty in Council; showing that he had taken the earliest opportunity of applying after the conflict of rulings in the High Court had occurred, and submitting that the title to numerous estates in the Presidency of Madras depended upon the question at issue in the case.

Mr. *Field*, Q.C., and Mr. *J. D. Mayne*, for the appellant, contended that the High Court was wrong in laying down as a general proposition of law that every unsettled polliam was necessarily a life estate only, and non-heritable, reverting to

(1) 5 Mad. H. C. Rep., 303.

(2) 6 Mad. H. C. Rep., 203.

the Government on the death of each holder. Polligars in possession can exercise all the right of absolute ownership, and *prima facie*, amongst Hindus, all property is hereditary, and in the son's hands is liable for the debts of the father. For the history of Polligars, see the Manual of the Madura District, compiled from official sources by Mr. Nelson, by order of the Madras Government; and the Madras Regulations XXV and XXXI of 1802 and IV of 1822. The loans made to the late zemindar had been for beneficial and necessary purposes, were binding upon the estate, and both on religious and legal grounds bound the heir—Strange's Hindu Law, p. 166; and *Hunoomanpersaud Panday v. Mussamut Babooee Munraj Koonweree* (1). If the general proposition of law failed, viz., that no unsettled polliam could be hereditary, no evidence had been given of special circumstances applicable to the zemindari which in any way limited its tenure. There was no evidence that the late zemindar, or any of his predecessors, had held the estate as a life-estate only, or had derived it from the Government. There are several Madras cases which show that unsettled polliams may be hereditary; see No. 13 of 1813, 1st Madras Select Reports, p. 78; No 11 of 1846, p. 141; No. 14 of 1817, Madras Decisions, 1857, p. 51; and Madras Decisions 1860, p. 7; *Naraguntty Lutcheedavamah v. Vengama Naidoo* (2) and *The Collector of Madura v. Veeracamoo Ummal* (3). In the absence of evidence to the contrary, the polliam must be assumed to be hereditary. Even if a *sanad* had been taken, that would not, in the absence of other evidence, rebut the presumption—*Kooldeep Narain Singh v. The Government* (4). The arguments in favor of this polliam being a mere life-estate revertible at each death to the Government, are drawn from the Madras Regulations above referred to, and certain decisions of the Sudder Courts under Regulation XXV of 1802. For the practice of the Indian Government, see the preamble to Bengal Regulation I of 1793, and the preamble to Madras Regulation XXV of 1802. All holders of estates, whether permanently

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(1) 6 Moore's I. A., 393.

(4) 11 B. L. R., 71; S. C., 14 Moore's

(2) 9 Moore's I. A., 66.

I. A., 247.

(3) *Id.*, 446.

1874 settled or not, were treated as proprietors, who were liable to
 OOLAGAPPA CHETTI v. ARBUTHNOT. eviction when their rent was in arrear.

Mr. *Forsyth*, Q.C., and Mr. *H. C. Merivale*, for the first respondent, contended that the polligars were never treated as absolute proprietors, but as holders of estates which were liable to be dealt with in various ways by the Government. They did not acquire proprietary rights, but were mere public officers in possession of certain holdings, until a permanent settlement of revenue payable to Government was made with them, and *sanads* were granted to them. To show the variety of holdings by polligars, and the diversity in the course of devolution of polliams, they referred to the judgment of the Madras High Court in *Lekamani v. Srimat Runga Kristna Muttu Vira Puchaya Naikar* (1). In that case the Court received evidence to show that the Government appointed; in this case it was assumed in the Court below that by the general law regarding polliams for which no *sanad* had been given, they were non-hereditary, and reverted at the death of each holder to the Government. If this general law failed, the case ought to be remitted to the Madras Courts to take evidence upon the issue, whether this polliam had, in the course of its history, gone by appointment of Government, either to the late zemindar or his predecessors.

The further argument of this appeal then stood over until the second appeal, which involved the same point as to the heritable character of an unsettled polliam or zemindari, were ready for hearing (2).

COLLECTOR OF TRICHINOPOLY v. LEKAMANI. — PEDDA AMANI v. M. ARUNGA-PURI. The second and third appeals were from decrees of the High Court of Madras in a suit brought by Lekamani against the Collector of Trichinopoly; the first being by the Collector of Trichinopoly from a decree of the High Court (Scotland, C.J., and Innes, J.), dated the 27th April 1871, deciding that the right of succession to the zemindari or polliam of Marungapuri was hereditary and cognizable by the Civil Court, and did not depend solely upon the will of the Government; the second being by the surviving widows of the late zemindar from another decree of the

(1) 6 Mad. H. C. Rep., 226.

(2) For the further argument, see p. 125; and for the judgment, see p. 140.

said High Court (8th November 1871) in the same suit, deciding that the above-mentioned respondent, named Ranga Krishna Muthu Vira Puchaya Naiker, the then zemindar of Marungapuri, was the legitimate half-brother and lawful heir to the late zemindar in priority to his widow.

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The suit was brought on the 21st August 1868, in the Court of Trichinopoly, by Lekamani against the said Collector, to recover the zemindari and other property of her late husband as his heiress and representative. The Collector was sued in his capacity of agent to the Court of Wards which had assumed the management of the late zemindar's estate, and as guardian of the minor zemindar.

The Collector pleaded, as in the previous suit brought by Oolagappa Chetty, that the polliam was an unsettled one; that the right to nominate a successor was vested in the Government, who had exercised that right in favor of the minor zemindar, and the exercise of that right by the Government, being an act of State, could not be questioned by any Municipal Court; that even if the polliam were a settled one, and devolved by hereditary succession, the minor zemindar, as undivided half-brother of the late zemindar, was his rightful heir, in priority to the widow; and that the late zemindar in a letter to the Collector had requested him to recognize the minor as his heir.

: On the 30th July 1869, the minor zemindar having attained his majority was added as a defendant and entered into a *rasi-nama* with the plaintiff Lekamani having for its object the compromise of the suit. The Collector, however, was allowed to be heard on the ground that he had not made over the zemindari and had not been relieved of his responsibility. On the 1st September 1869, the Civil Judge ruled in favor of the Collector's contention as to the polliam being an unsettled one, and the right of succession thereto being vested in the local government, and dismissed the suit. The plaintiff, accordingly, appealed to the High Court making the said zemindar the sole respondent. The Collector petitioned that he might appear, and be heard on behalf of the Government, and eventually was admitted as a party respondent. Further evidence was thereupon taken by

1874 the High Court, which on the 27th April 1871 decided, first, that
 COLLECTOR OF the suit was cognizable by a Civil Court; and secondly, that the
 TRENCHINGPOLY polliam was an ancestral hereditary estate (1), and thereupon
 v. LOKAMANI. directed an issue to be tried, whether the half-brother were
 PEDDA AMANI legitimate or not. This issue was found by the Zilla Judge in
 v. favor of the said half-brother, and his finding being confirmed by
 ZEMINDAR OF the High Court on appeal, on the 28th November 1871, the
 MURUNGA- widow's suit was dismissed with costs.
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From the first decree the Collector appealed, and the second and third widows of the zemindar, who had been made plaintiffs on the death of Lokamani, filed an appeal from the second decree.

PEDDA AMANI . The third appeal namely that of the widows, was first heard.
 v. Mr. *Forsyth*, Q.C., Mr; *Macpherson*, and Mr. *J. B. Norton*
 ZEMINDAR OF appeared for the Collector and the zemindar.
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Mr. *J. D. Mayne* and Mr. *F. C. J. Millar* appeared for the widows.

For the appellants, the followings authorities were cited on the question of legitimacy :—

Menu, ch. vi., ss. 35—37 ; oh. ix, ss. 8, 158—161, 173, & 180 ; Mitakshara, ch. i, s. 11, vv. 1, 2, 3, & 19 ; 3 Colebrooke's Digest, pp. 156, 173, 224, & 271 : Smriti Chandrika, ch. x., ss. 1—5, & 12 ; Madhaviya, ss. 27 & 32 ; Mayukha, c. iv, s. 4, vv. 41—46 ; Dattaka Mimansa, s. 1, vv. 33, 35, & 64 ; Dattaka Chandrika, s. 1, vv. 8 & 9 ; and Norton's Leading Cases, p. 495.

Counsel for the respondents were not called upon.

The judgement of their LORDSHIPS was delivered by

Sir BARNES PEACOCK (who, after disoussing the evidence, continued) :—Their Lordships think that the High Court came to a correct conclusion that a marriage did take place between the father and mother of the child prior to its birth ; and, assuming that the High Court are correct in finding that the child, although born after marriage, was procreated or begotten before the

(1) 6 Mad. H. C. Rep., 208.

marriage took place, their Lordships are of opinion that that Court came to a right conclusion, in point of law, that the child was legitimate. 1874
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The point of illegitimacy being established by proof that the procreation was before marriage had never suggested itself even to the learned Counsel for the appellant at the time of the trial, nor does it appear, from the authorities cited, to have been distinctly laid down that, according to Hindu law, in order to render a child legitimate, the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law, that law must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of opinion that the Hindu law is the same in that respect as the English law.

Under these circumstances, their Lordships are of opinion that the High Court came to a correct conclusion in finding that the defendant had made out that he was the legitimate half-brother of the deceased polligar; and that being members of an undivided family, the polliam descended to him.

That disposes of the cause: for, if the defendant is the heir of the deceased polligar, the widow can have no claim. The decree of the High Court was correct, and her suit must be dismissed.

Their Lordships will, therefore, humbly recommend Her Majesty that the judgment of the High Court be affirmed, and the widow's appeal dismissed with costs.

Appeal dismissed.

The question of law raised by the Collector in the first and second appeals was then argued.

Mr. Forsyth, Q.C., and Mr. J. B. Norton, for the Collector, drew attention to the difference between Bengal Regulation XIX of 1793, and Madras Regulation XXXI of 1802, in respect of their provisions for the settlement of land revenue. While, by the former, the ruling power was declared to be entitled to a proportionate share of the produce of each biga; by the latter it was constituted actual proprietor of lands of every description. OOLAGAPPA
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As to necessity of the Government's assent to alienations of land by the holders, the said Regulations were at variance. The former rendered void grants of land which purported to be "exempt from payment of revenue;" the latter avoided all alienations of land except those made "by consent of the ruling power." Under Bengal Regulation VIII of 1793, s. 4, the settlement was to be concluded "with the actual proprietors of the soil of whatever denomination, whether zemindars, talookdars or chowdries;" while under Madras Regulation XXV of 1802, ss. 1, 3, the zemindars or other landholders must obtain a *sanad* or deed of permanent property; and they only became proprietors after, and in consequence of, the settlement made. In Bengal proprietorship was recognized before any settlement was made, and under Bengal Regulation VIII of 1793, s. 44, if the proprietors declined "to engage for the *jama* proposed to them, they were to receive (a *malikana* (an allowance in consideration of their proprietary right) at the rate of 10 per cent. on the *sudder jama* of their lands." In Madras the Government is the proprietor and can select the parties with whom the settlement of land revenue is to be made. On the other hand, in Bengal, in the North-Western Provinces, and in Oudh, the proprietorship is vested in private individuals and rules are provided by the Regulations for the purpose of discovering in case of dispute who are the persons entitled and with whom the settlement must be made, and for ascertaining the same, if necessary, by judicial enquiry. It cannot be contended that Madras Regulations XXXI of 1802 and XXV of 1802 lay down inconsistent principles, or that in the former proprietary right is reserved to the Government, while in the latter it is affirmed to exist in zemindars, polligars, and others. Regulation IV of 1822 was only intended to regulate the interpretations of certain Regulations passed in 1802, and leaves untouched Regulation XXXI of 1802, s. 1. The Local Government was not a party to, and is not bound by, the case of *Naragunty Lutchmee-davamah v. Vengama Naidoo* (1), in which it was assumed that the estate was hereditary. Even in that case the parties obtained the leave of the Government before they began their suit

(1) 9 Moore's I. A., 66.

Nor was it decided in *The Collector of Madura v. Veeracamoo Ummal* (1) that the Government had no right to appoint to an unsettled polliam, but merely that they were too late in raising the point.

On the evidence in this case no *sanad* was ever granted in respect of this polliam, there has never been any settlement of the revenue, the defendants have not shown that the property was hereditary, and both the late polligars invoked at their death the assistance of the Collector, and begged his protection for their successor.

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Mr. J. D. Mayne, for the widows, in the case of *The Collector of Trichinopoly v. Lekamani*, and in reply for the appellant in the case of *Oolagappa Chetty v. Arbuthnot*, contended that the preamble of Regulation XXXI did not apply to a case in which neither the possession of a *sanad* nor of a rent-free tenure was alleged. The Government in the Carnatic as in Bengal never assumed the actual proprietorship of the soil. They based their rights on treaty, and not on conquest. Even if they succeeded to the full rights of the Mahomedan Government, still although the Mahomedan law (2 Hidayah, pp. 204, 205, & 208 of tithe or tribute) sanctioned the taking of everything from infidels, yet the practice was never adopted by the Moguls; see Elphinstone's History of India, and the legislation of Akbar. By Hindu law (see Menu, ch. vii, v. 130; ch. viii, v. 39; and ch. ix, v. 44) the king had not the absolute ownership of land but was entitled to a share of its produce. Hindu law did not create intermediate tenures. The *Nayar* tenures and secessions of Malabar and Canara are inconsistent with the theory of absolute universal proprietorship by the Government. Hindu officers of the Mahomedan Government gradually hardened into proprietors; and ryots with rights of occupancy and alienation subject to payment of rent held absolutely as against both Hindu and Mahomedan Governments. This notion of Government ownership is as foreign to the tenures called polliams as it is to tenures of other classes just enumerated.

(1) † Moore's L. A., 446.

- 1874 With regard to polliams the instructions to the Board of Revenue, dated 4th September 1799, given in the 18th Appendix to the Fifth Report of 1812, shew that some of them were forfeited or escheated to the Government, and were restored to the right-ful polligars on their arrears being satisfied. The settlement of revenue with some of them followed at a later date, not with any notion of converting life estates into absolute estates, but merely in reference to the interests of the revenue. The object of the different Regulations was to protect the revenue. The object of s. 8 of Regulation XXV of 1802 was to secure the apportionment of revenue or rent on the division of land—*Vencataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren* (1). Regulation XXXI of 1802 was passed expressly to protect the revenue, payment of which, it recited, had been collusively stopped. Regulation IV of 1822 is an explanatory, not a repealing, Act, and was passed in order to restrict the application of the former Regulations. The zemindar in Bengal has not a full proprietary right, but has the soil subject to the customary rights of others. The office of polligar insensibly became hereditary by custom—*Thakooranee Dossee v. Bisheshur Mookerjee* (2), and see 2 Hunter's Orissa, pp. 225, 228, & 236.
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Sir BARNES PEACOCK.—The nature and object of the suit in which this appeal was preferred are clearly stated in the judgment pronounced by the High Court at Madras.

To make the case intelligible it may be shortly stated that the suit was brought in the Civil Court of Trichinopoly by Lekamani, the first widow of Terumalai Puchaya Naiker, the late zemindar of Marungapuri, to recover, as his heiress, amongst other things, the villages attached to the zemindari. The suit was brought against the Collector of Trichinopoly as the agent of the Court of Wards in charge of the zemindari, on behalf, and as the guardian, of Ranga Kristna Muthu Vira Puchaya Naiker, a minor, who was the half-brother, of the

(1) 8 Moore's I. A., 327.

(2) B. L. R., Sup. Vol., 202; see pp. 209, 230, 275, & 286.

deceased zemindar, and who, after his death, had been recognized by the Government as the zemindar. At the time of the late zemindar's death, he and his half-brother the minor were members of an undivided family, and, consequently, if the estate was hereditary, and the minor was legitimate, he was the heir of the deceased zemindar—*Naragunty Lutchmeedavamah v. Vengama Naidoo* (1).

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The principal defences set up by the Collector were :—

1. That no *istimrari sanad* had been granted for the zemindari, and that it was an unsettled polliam ; that after the death of the late zemindar the right to nominate a successor to him was vested in the Government ; that the Government had granted the zemindari to the minor, Ranga Kristna ; and that this, being an act of State, could not be questioned by any Municipal Court.

2. That, even if an *istimrari sanad* had been granted, and the polliam had been settled, the minor, as the undivided half-brother of the deceased zemindar, would be the rightful heir thereto.

The widow disputed the legitimacy of the minor, and the following were the principal issues laid down for trial :—

1. Whether the Court was competent to entertain the suit ?

2. Whether the half-brother of the deceased zemindar was his legal heir, or whether the plaintiff herself was entitled to succeed to the zemindari ?

3. Whether the minor was the half-brother of the deceased zemindar ?

Subsequently, the minor, having attained his full age, was admitted as a supplemental defendant in the suit ; but the first defendant, the Collector, was also allowed to be heard in defence. Whereupon the first defendant, the Collector, having been examined as a witness, the Judge held that it was conclusively proved that the zemindari was an unsettled polliam, and that the right of succession having been declared by the highest authority to be vested in Government and not in the line of lineal succession, it followed that that right could not be called in question in that Court. He, therefore, found the first issue

1874 in favor of the first defendant, and dismissed the plaintiff's
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The plaintiff appealed to the High Court and made only the second or supplemental defendant, the half-brother, respondent. Whereupon the Collector presented a petition to the High Court stating that it was contended on the part of the appellant that the zemindari was not an unsettled one, and consequently that the Government had no right to interfere with the succession thereto on the death of the zemindar, and that the Government was interested in the decision of that question; he therefore prayed that he might be made a party to the suit and allowed on behalf of Government to defend the appeal. On the 17th June 1870, the petition of the Collector was dismissed. Another petition to the same effect was subsequently presented by the Collector, the Government offering to forego all claim to costs. Whereupon it was ordered that the application should be admitted on condition that, in the event of the appeal being dismissed with costs, no more than the costs of one respondent should be allowed against the appellant.

Thus it appears that the Collector, who was originally a defendant merely as agent of the Court of Wards and as guardian of the minor zemindar Ranga Kristna, became substantially a party to the suit on behalf of and as representing the interests of Government. The appeal came on to be heard before the High Court who, at the close of the arguments on the first day of the hearing, were of opinion, for the reasons specified in their judgment, that, upon the case presented by the record returned to the Court, the decree of the Zilla Court could not stand, and they adjourned the further hearing of the appeal; afterwards, having obtained all the evidence which the parties were able to adduce with respect to the proprietary right of the late zemindar, and having heard the case fully argued, they delivered judgment.

In the first place, they held that the Government proceedings admitting the minor to the succession did not amount to an act of State, which debarred the cognizance of the suit by a Municipal Court. The correctness of their decision upon that point has not been disputed in the present appeal.

They then proceeded to consider the question whether the estate of the late zemindar was hereditary or whether he had merely an estate for life. Upon that point they delivered a very able and elaborate judgment in which they held that the polliam was an ancestral hereditary estate.

They said :—

"With respect to the proprietary right possessed by the late zemindar, there is now before the Court the whole of the evidence which the parties have been able to adduce, and we have had the advantage of hearing the case ably argued. The question for determination is, whether he had vested in him an hereditary estate, which passed on his death to his heir in the order of legal succession, as the plaintiff contends, or an estate for life, on the termination of which the right to dispose of the property reverted to the Government, as the defendants contend. The villages and lands mentioned in the plaint form one of the Manapuri polliams, but the estate and the holder of it have been commonly given the designations used in the plaint, of zemindari and zemindar; it is, however, a conceded fact that no *istimrari sanad* granting the estate under Regulation XXV of 1802 has ever existed; and the positions advanced on both sides, stated summarily, are, on behalf of the plaintiff, that there is sufficient evidence from which to draw the inference that the property had been permanently assessed; but, if not, that the tenure by which the polliams not permanently assessed are held had not attached to it, as an essential incident, the limit of the life of the holder, but that, both historically and by judicial authority, the tenure is rather shown to be in its nature hereditary; that it may be either hereditary or for life according to the nature of the grant creating it, and that in the present case the evidence proved the polliam to have been held as an hereditary estate."

Then, after reviewing the authorities, the evidence, and the arguments of Counsel, they proceeded :—

"Upon the whole, we are of opinion that it has been established as strongly as a claim of this nature can be expected to be proved, that the polliam in dispute is an ancestral hereditary estate which has devolved through several generations in the ordinary course of legal succession. Almost everything tending to this conclusion that could reasonably be looked for, it seems to us, exists, save the grant of a *sanad* under Regulation XXV of 1802; and that is not, in our judgment, made by law indispensable, except to render the revenue assessment permanent. It follows that the right of succession contested in the present suit depends upon the question raised by the second issue

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1874 in the suit, whether the second defendant is the legitimate brother
 COLLECTOR OF of the late polligar, Tirumalai Puchaya Naiker. If so, he is the right-
 TRICHINOPOLY ful heir to all the property claimed in the plaint, no division having
 v. taken place between him and his deceased brother. But if illegitimate,
 LEKAMANI. he has no right to any portion of it. No additional issue is necessary."

An issue was then directed to try whether the half-brother was legitimate or not.

It is admitted that the villages and lands mentioned in the plaint are, as pointed out by the High Court, one of the Manapuri polliams, and that no *istimrari sanad*, granting the estate under Regulation XXV of 1802 of the Madras Code, has ever been issued.

The case has been very elaborately and ably argued on both sides, and their Lordships having carefully considered all the Regulations and authorities which have been cited, are clearly of opinion that the decision of the High Court is correct.

It was contended by the learned Counsel for the Collector appellant that in the Presidency of Madras the Government had reserved to itself, and had by legislative enactments asserted, its right to all lands of every description; and Regulations XXV. and XXXI of 1802 of the Madras Code were referred to as having that effect.

It was recited in the preamble of the former of those two Regulations, that the assessment of land revenue had never been fixed, and that the zemindars and others had no security for the continuance of a moderate land tax; *that for the attainment of an increased revenue it had been usual for Government to deprive the zemindars and to appoint persons on its own behalf to the management of the zemindaris, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever*; that it was obvious that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population, and wealth, and diminishing the security of personal freedom and of *private property*, and that the British Government, impressed with a deep sense of the injuries arising to the "State and to its subjects, from the operation of such

principles, had resolved to remove from its administration so fruitful a source of uncertainty and disquietude, to grant to zemindars and other landholders, their heirs and successors, a *permanent property* in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances."

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It was then enacted by s. 2 that, 'in conformity with these principles, *an assessment should be fixed on all lands liable to pay revenue to Government: and in consequence of such assessment the proprietary right of the soil should become vested in the zemindars or other proprietors of land and in their heirs and lawful successors for ever*; and it was further enacted by s. 3 that, when the conditions of the permanent settlement of the revenue should have been adjusted, a *sanad-i-milkiat istimrar* or deed of *permanent property* should be granted on the part of the British Government to all persons being or constituted to be zemindars or proprietors of land.

Laying out of consideration for the present the words of the preamble, which form no part of the enactment of the Regulation (see Dwaris on Statutes, p. 655), it is clear that the affirmative words of the 2nd section "that, in consequence of the assessment the *proprietary right* of the soil shall become vested in the zemindars, &c.," did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a Statute without any negative expressed or implied do not take away an existing right (see Coke's 2nd Institute, p. 200; Dwaris on Statutes, p. 637). There are no words declaring that no proprietary right then existed, or should thereafter be deemed to exist except in Government, in any lands not permanently settled; and in their Lordships' opinion it was not the intention of the Legislature to pass such an enactment.

The words "proprietors of land," as used both in the Bengal Code of 1793, and in the Madras Code of 1802, have a technical

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signification, (see the definition in Bengal Regulation VIII of 1793, ss. 5, 6, and 7 ; and Regulation XXVII of 1802, Madras Code, s. 2). They refer to " zemindars, independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government ;" and the words " proprietary possession," as used in the recital of Regulation XXV of 1802, must also be read in a similar sense as meaning the possession and rights of a proprietor in the technical sense in which that word is used viz., the person who pays the revenue immediately to Government, (see Regulation I of the Madras Code, ss. 14 and 16.)

There are frequently many valuable tenures existing between the zemindar and the ryots, or actual cultivators of the land. If the Regulations XXV and XXXI of 1802 were to be read in the sense contended for on the part of the Collector appellant they would have the effect of vesting in Government, not only all hereditary estates, but all sub-tenures, whether for life or otherwise, and whether created by the native Governments before the territories came under the Government of the East India Company or not.

The words of the recital " the implied right " and the actual exercise of the *proprietary* possession are, to say the least of them, very ambiguous. But whatever may be the real meaning of those words, the recital clearly was not intended to amount to more than a declaration that it had been usual for Government, in order to enforce an increased revenue to deprive or dispossess the zemindars, and to take the management of the zemindaris into the hands of their own officers ; or, in other words, that they were in the habit of taking *khas* possession of the zemindaris of those zemindars who neglected to pay any increased amount of revenue assessed upon them.

A similar course seems to have been adopted in Bengal up to the time of the permanent settlement, (see Regulation I of 1793), and to have been continued at the time of that settlement, with respect to every zemindar who might decline to engage for the *jama* proposed to be permanently settled upon his estate, (see Regulation VIII of 1793, s. 43, Bengal Code.)

Further, the usage recited was limited to the purpose of

obtaining an increased revenue ; and it was by means of the usage that the Government was said to have reserved to itself the implied right, &c. The words are "*thereby reserving to the ruling power the implied right, &c.*" The preamble recognized the right of private property when it stated that the then existing mode of administration was injurious "*by diminishing the security of private property.*" It did not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The language of the recital applied as much to zemindars in their lifetime as it did to the heirs of zemindars upon their deaths. If the words were to have the unlimited construction and effect contended for, the Regulation would have justified Government in depriving or dispossessing the deceased polligar in his lifetime, and in transferring the zemindari to a new holder to the same extent as it would have justified them in dispossessing his heirs after his death. Such a construction would go far beyond the claim set up by the Collector in the suit, *viz.*, that the deceased zemindar had only a life estate which reverted to Government and was at their absolute disposal after his death ; nay, it would do more, it would render every landowner in the Presidency, except those who claimed under a permanent settlement, liable to be dispossessed or deprived of his estate, and to have it transferred to a new holder at the will of Government.

The preamble to Regulation XXXI of 1802; which, as before observed, was not an enactment, is as follows :—"Whereas the Ruling Power of the provinces now subject to Fort St. George has, in conformity to the ancient usage of the country, reserved to itself and has exercised *the actual proprietary right of lands* of every description, and where as, consistently, with principle all alienations of land, except by the consent of the Ruling Power, are violations of that right ; and whereas considerable portions of land have been alienated by the unauthorized encroachment of the present possessors, by the clandestine collusion of local

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officers, and by other fraudulent means ; and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description, it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding or claiming to hold, lands exempted from the payment of revenue to Government under grants not being *badshahi* or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government ; wherefore the following rules are enacted for that purpose."

The Act, s. 2 then proceeds to render valid all grants for holding lands exempt from the payment of public revenue which had been made before certain dates, and to leave to the determination of Government all doubts respecting the validity of other grants of that nature.

The words " has reserved to itself and has exercised the actual proprietary right of lands of every description," used in the above preamble, are not precisely the same as those used in the preamble of Regulation XXV, but they evidently have reference to the same usage, *viz.*, the custom of dispossessing zemindars, and taking their zemindaris into the *khas* possession of Government for the purpose of realizing the public revenue from time to time assessed upon them. The object of the Regulation XXXI of 1802 was merely the protection of the revenue from invalid *lakhiraj* grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue ; it was not intended to confer upon government any title which did not then exist. The words " alienations of land" referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. It is clear that the Regulation never intended to assert that, according to the usages of the country, there was no private right to lands ; for in rendering valid all *lakhiraj* grants made prior to a certain date, and declaring that the holders should continue to enjoy the same free from the payment of revenue, there was this proviso, that the lands had not escheated to the State since those dates.

It was urged, in support of the Collector's appeal, that there

was a long course of judicial decisions, from 1813 to the present time, showing that polligars had merely a life interest in their polliams.

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The first case cited was No. 13 of 1813, 1 Mad. Sel. Decrees, p. 87. In that case the plaintiff had never had the possession of the zemindari. His claim had been repeatedly brought to the notice of Government, and had been rejected. The permanent settlement had been entered into with the defendant, and a *sanad-i-milkiat-i-istimrar* granted to him by Government, under the provisions of Regulation XXV of 1802. The case was not decided upon the mere words of the recital of Regulation XXV of 1802, but upon the enactment in s. 2, and it was held that the Government having *permanently* settled with the defendant, and *granted him a sanad*, he had acquired a title under that Regulation, and that the plaintiff could not recover the estate. The decision, however, whether right or wrong (probably right under the law as it then stood), was decided before the passing of Regulation IV of 1822, by which it was enacted that Regulations XXV, XXVIII, and XXX of 1802 were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and left them to recover in the established Courts of Justice *their rights* if infringed, (an enactment similar in effect to that contained in the Bengal Regulations relating to the permanent settlement in that Presidency; see Regulation VIII of 1793, Bengal Code, s. 80.)

Regulation IV of 1822 expressly recognized the fact that landholders had actual rights which they might recover if infringed.

In the case cited (No. 13 of 1813), a case was referred to (Appeal No. 9 of 1813). in which a talqokdar's rights were asserted and enforced against a zemindar, which is quite at variance with the contention that the property in lands of every description belonged to and was vested in Government. It is true it was stated by the Court, in No. 13 of 1813, that it was plainly deducible from Regulation XXV of 1802 that, previously to the fixing of the permanent assessment, succession to zemindari tenures was not governed exclusively by the law of

1874 inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures in such manner as might be considered most expedient for the purpose of realizing the public revenue due from the lands, and that it was clear therefore that, in rejecting the claims of the plaintiff, whatever might be the specific grounds of such rejection, and in granting the zemindari to the original defendant, the British Government exercised a right which, according to the declared usages of the country, was vested in the ruling power. It was to correct opinions such as those that Regulation IV of 1822 was passed.

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The next case was No. II of 1846, p. 141. In that case there had not been any permanent settlement or any *sanad* granted by Government. The zemindari had been made over to the father of the plaintiff and defendant after the district came into the possession of the East India Company, and it continued in his possession to the year 1811, when, upon his death, it was made over to his eldest son. The Court said that the respondent held under a title which the Government, in the exercise of the right vested in them by the usage of the country, had conferred upon him. One of the Judges who decided the last case was also one of those who decided No. 13 of 1813, evidently putting the same construction upon Regulation XXV of 1802 as he had done in No. 13 of 1813.

Case No. 14 of 1817 is subject to similar remarks. The Court, of which two of the Judges were the same as those who decided the former case, acted upon similar deductions from Regulation XXV of 1802.

All those cases were decided prior to Regulation IV of 1822, and were probably some of the decisions which induced the Legislature to pass the Regulation.

Their Lordships do not consider that the cases cited from the Madras Select Decrees are binding authorities in support of the contention that Government has a right to deal with the polliam in the present case, or any other polliam, according to arbitrary will, independently of the rights of the parties, or in support of the position that the absolute right to every polliam not permanently settled is vested in Government, or that the tenure is for

life only, and that upon the death of the polligar the estate reverts to Government. 1874

Many of the cases cited in argument are of no greater weight or authority than that which is the subject of the present appeal. They are modern authorities, and there is no long uniform current of decisions sufficient to show that every polliam not permanently settled is necessarily only a tenure for life, or at the will of Government. COLLECTOR OF TRICHINGOPOLY v. LEKAMANI.

In the case of *Nāragunty Lutchmēdavamah v. Vengama Naidoo* (1), and in that of *The Collector of Madura v. Veeracamoo Ummal* (2), the polliams were treated as hereditary, the question in each being as to the person entitled to succeed as heir. In the latter case, the Government of Madras claimed to be entitled by escheat for want of male heirs, thereby admitting that the estate was hereditary: but it was held that females were not precluded from inheriting a polliam, thereby deciding that it was hereditary. It did not appear in any of those cases that the polliam had been permanently settled or that a *sanad* had been granted in respect of it under Regulation XXV of 1802. They show that a polliam may be hereditary though not permanently settled under Regulation XXV of 1802.

Their Lordships are of opinion that each case must depend upon its own particular circumstances; that a polliam may be hereditary, and that the position laid down by the High Court is correct. They there say:—

“The existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property.”

Their Lordships are also of opinion that the finding of the High Court upon the evidence adduced that the polliam in dispute is an ancestral hereditary estate is also correct.

It does not at all follow from the application made to Government for the recognition of the minor that he had not an hereditary estate. It was extremely common in Bengal before the acquisition of the Dewanny where a tenure was in fact hereditary from father to son to take out a new *sanad* upon each

(1) 9 Moore's I. A., 67.

(2) 9 Moore's I. A., 446.

1874. descent—*Kooldeep Narain Singh v. The Government* (1); so also it appears that upon a transfer of title to lands in Calcutta, either by alienation or descent a fresh potta was given to the new holder: but that was merely a fiscal regulation, and the potta formed no part of the holder's title—*Freeman v. Fairlie* (2).

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The Collector in his written statement alleged that the polliam was unsettled, and that after the death of the late zemindar the right to appoint a successor was vested in the Government, and that accordingly the Government had granted the said zemindari to the minor defendant. No grant from the Government was produced. That which is called a *sanad* was not a grant creating a new right, but a mere recognition or acknowledgment of an existing title; see the proceedings of the Madras Government (No. 17A, Record, p. 23). From this document it appears that, upon the death of the late polligar, the Collector sent a report to the Court of Wards stating among other things as follows:—

"The deceased zemindar, on the day previous to his death, addressed to me a petition requesting me to recognize his brother as his successor to the estate, and to appoint his cousin to manage the affairs of his estate during the minority of his brother.

"The Tahsildar was deputed to ascertain the wishes of the widows of the deceased on this point, and to afford information regarding the property left by the zemindar. The Tahsildar submitted a statement, obtained from the widows, from which it appears that they earnestly request a compliance with the request contained in the petition addressed to me by their husbands, but with this modification, that the cousin should conduct the affairs of the estate under the direct control of the first-mentioned widow. The widows admit the genuineness of the petition.

"The deceased left no will. The estate consists of the Marangapur zemindari and certain *mirasi* lauds, the assessment of which amounts to Rs. 2,528-8-10."

The above report was submitted by the Court of Wards to Government with a recommendation that the Collector be authorized to recognize the brother of the deceased (the defend-

(1) 11 B. L. R., 71; S. C., 14 Moore's I. A., 247.

(2) 1 Moore's I. A., 346.

ant in the suit) as zemindar of Marungapuri, and to take charge of the estate. They added—assuming that the family is undivided, as is probably the case, *the brother of the deceased would be the legal heir to the zemindari, irrespective of the petition or consent of the widows.* Upon that report the Government passed an order, dated September 17, 1864, that the Court's proposal is approved.

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It also appears that after the death of the father of the late polligar, Terumalai, the Collector reported that the deceased left one son Terumalai, *the heir to the estate*, and one son, the present defendant, a little boy by his fifth wife, then three years of age, and he recommended that Terumalai should be recognized and invested as polligar in the room of his father. Upon which the Government ordered that Terumalai should be recognized and placed in charge of the estate.

In England, proof of the possession of land or of the receipt of rent from the person in possession is *prima facie* evidence of a seisin in fee. In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions, from ancestor to heir; see *Kooldeep Narain Singh v. The Government* (1). There is no difference in this respect between a polliam and an ordinary zemindari. The only difference between a polliam or zemindari which is permanently settled and one that is not is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter, the Government may or maynot have that power.

The history of the polliams of southern India is well known. It is to be found in the Fifth Report from the Select Committee from the House of Commons on the affairs of the East India Company, presented in 1812, a work of great research, and in the Madura Manual, compiled by Mr. Nelson of the Madras Civil Service, by order of the Government of Madras. The account given in the Fifth Report was adopted in the judgment pronounced by Lord Kingsdown in the case above quoted, in

(1) 11 B. L. R., 71; S. C., 14 Moore's I. A., 247.

1874 which it was held that a polliam was an ancestral estate in the nature of a raj.

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Looking at the evidence in the cause with reference to the tenure of the polliam in question, their Lordships have no doubt that the High Court arrived at a correct conclusion, and that the polliam is an ancestral hereditary estate.

The question as to the legitimacy of the minor defendant, and his right to inherit, if the estate of his brother was an estate of inheritance, was found by the High Court in his favor, and that decision has already been upheld by their Lordships in the widow's appeal. The legitimacy of the minor having been upheld, the suit of the widow was properly dismissed, for whether the estate was one of inheritance or one merely for the life of her deceased husband, with a right on the part of the Government, on his death, to appoint a successor, the widow could have no right to succeed. The decree of the High Court was correct, and even if the point raised by the Collector on the part of the Government were decided in his favor, the decree dismissing the widow's suit must still be upheld. Their Lordships have already stated that they will humbly recommend Her Majesty that the decree of the High Court be affirmed with costs.

As the point raised by the Collector was one of importance, and necessary to be decided with reference to the costs of the Collector's appeal, their Lordships have heard that question argued; and having fully considered the very able and elaborate arguments of the learned Counsel on both sides, they have arrived at the conclusion that beyond all doubt the decision of the High Court was correct, and they will therefore humbly recommend Her Majesty, with reference to the Collector's appeal, that the decree be affirmed and the appeal dismissed with costs.

Appeal dismissed.

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The judgment of their LORDSHIPS in the first appeal was then delivered by

Sir B. PEACOCK.—This case is governed by the principles laid down in the appeal just decided between the Collector of Trichinopoly and the widow of the zemindar of Marangapuri.

Prima facie, the polliam was hereditary. If it was hereditary and descended to the minor son as the heir of his father, the income of the zemindari was liable to pay the debts incurred by the deceased zemindar.

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The Civil Judge, upon the authority of decided cases, principally of those cited from the Madras Select Decrees, to which their Lordships have referred in the other appeal, held that the polliam was not hereditary, but that the object for which the debt was incurred was such that the debt was a charge upon the estate, and that the income derivable from it was liable to discharge the debt, and he gave a decree accordingly.

Upon appeal, the High Court held that, upon the death of the polligar, by whom the debt was contracted, the proprietary right to the polliam reverted absolutely to Government, and that, by their fresh grant to the defendant, a newly-created estate for life became vested in him; and that, consequently, the defendant, as the representative of his father, was not liable to pay the debt out of the revenues of the zemindari, and they reversed so much of the decree of the Lower Court as declared the liability of the defendants in respect of the revenues of the polliam. The judgment of the High Court was pronounced on the 13th May 1870, before the judgment of that Court in the Marungapuri case was given. Their Lordships are of opinion, that no sufficient evidence was given to prove that the polliam reverted absolutely to Government upon the death of the late polligar, or that the defendant held under a fresh grant, by which a newly-created estate for life became vested in him. They are, therefore, of opinion that the decree of the High Court ought to be reversed with the costs of this appeal.

In ordinary course, their Lordships would at once proceed to recommend that the decree of the Civil Judge be affirmed. Mr. Forsyth, however, suggested that the Collector may have been misled by the decisions prior to the judgment in the Marungapuri case, and may, in consequence of those decisions, have abstained from offering evidence to show that the polliam was not hereditary, and that, if the decree of the High Court should not be upheld, the case ought to be

1874 remanded, to enable the Collector to adduce evidence to that effect, if he has any.

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The first issue raised in the Lower Court, *viz.*, whether the zemindari, or the income thereof, was answerable for the debt contracted by the late zemindar, certainly involved the question whether the zemindari was hereditary, or whether the late zemindar had merely a life interest in the estate. But that issue was too general; it involved several mixed questions of law and fact, and did not sufficiently direct the attention of the parties to the main question of fact necessary to be decided. Their Lordships are, therefore, of opinion that, if the respondents, or either of them, desire it, it ought to be referred to the lower Court to raise and try the following issue, *viz.*, whether the late zemindar had an estate of inheritance in the zemindari which descended to his minor son as his heir. That reference, however, ought not to be made except upon the condition of the respondents, or one of them, notifying to the High Court, within a reasonable time, their or his desire to have that issue referred for trial, and upon payment of the costs of this appeal and of the costs of the appeal to the High Court. Their Lordships will, therefore, humbly recommend to Her Majesty that the decree of the High Court be reversed; that the respondents do pay to the appellant the costs of this appeal and also the costs of the appeal to the High Court; and further that, upon payment of such costs the High Court do, under the provisions of s. 354 of the Code of Civil Procedure, refer for trial by the Court of the Civil Judge the following issue, *viz.*, "Whether the late zemindar had an estate of inheritance in the zemindari which descended to his minor son as his heir," provided the respondents, or one of them, do, within six months from the date of the order to be made by Her Majesty in Council, notify to the High Court their or his desire to have such issue tried; and that, in the event of no such notification being made within the period aforesaid, the decree of the Civil Judge do stand affirmed; that, in the event of such issue being referred, all subsequent proceedings be taken under the provisions of s. 354 of the Code of Civil Procedure; that the costs hereby ordered

to be paid come out of the estate; that the sum of £800 in the hands of the Registrar, as security for the costs of the respondent in case this appeal be dismissed, be returned to the appellant, Oolagappa Chetty or to his attorney.

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Appeal allowed.

Agents for Oolagappa Chetty : Messrs. *Burton, Yeates, and Hart.*

Agents for the Collector and the Zemindar : Messrs. *Lawford and Waterhouse.*

Agents for the widows : Messrs. *Jones, Blackland, and Son.*

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Mackay, and Mr. Justice Ainslie.

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Aug. 10
Sept. 7.

ESHAN CHUNDER BOSE (DECREE-HOLDER) v. PRANNATH NAG
(JUDGMENT-DEBTOR).*

Limitation—Act IX of 1871, Sched. ii, No. 167—Execution of Decree—Bona fides.

See also
15 B. L. R.
App. 13.

A decree-holder, applying for the execution of his decree, is entitled, under the provisions of Act IX of 1871, to have such execution upon his showing that his application is made within three years from the date of a previous application to the Court to enforce the same decree, or from the date of issuing notice under s. 216 of the Code of Civil Procedure in the same matter.

This was an application to execute a decree dated the 17th of November 1865. The first application for execution was made on the 2nd of April 1868, after due service of notice on the judgment-debtor. Another application for execution was made on the 4th of February 1869, whereupon execution was

* Miscellaneous Special Appeal, No. 77 of 1874, against an order of the Subordinate Judge of Zilla Dacca, dated the 29th December 1873, reversing an order of the Munsif of Bhanga, dated the 15th April 1873.

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allowed to proceed, and certain properties, belonging to the judgment-debtor, were attached, and a sale proclamation was issued. The sale, however, was stayed on the application of the judgment-debtor, and no further steps having been taken in the matter, the case was struck off on the 26th of April 1869. On the 10th of February 1872, execution was again revived, and the case again struck off on the 18th of March following. It was again revived on the 3rd July 1869, and struck off on the 31st of that month. On the 23rd of August 1872 it was again revived, and, after service of notice on the debtor, the case was struck off on the 12th of November following. The present application was made on the 17th of January 1873. It was contended by the judgment-debtor that, under the circumstances, the execution was barred. The Munsif, holding that the requirements of the law had been complied with, allowed the execution to proceed. On appeal by the judgment-debtor, the order of the Munsif was reversed by the Subordinate Judge, who held that the proceedings between the 10th February 1872 and the 17th January 1873 not being *bona fide* steps taken to enforce the decree, the present application was barred, more than three years having elapsed from the last application.

On special appeal by the decree-holder, the case came on before Jackson and McDonell, JJ., who, in consequence of their differing in opinion from the decision in *Rohini Nundun Mitter v. Bhogoban Chunder Roy* (1), referred to a Full Bench the

(1) *Before Mr. Justice W. Markby and Mr. Justice Mitter.*

ROHINI NUNDUN MITTER (DECREE-HOLDER) v. BHOGOBAN CHUNDER ROY AND ANOTHER (JUDGMENT-DEBTORS).*

The 12th May 1874.

Limitation—Act IX of 1871, Sched. ii, No. 167—Execution of Decree—Bona fides.

Under Act IX of 1871, Sched. ii, No. 167, a decree-holder is entitled to have execution of his decree within three years of a

notice under s. 216, Act VIII of 1859, or of a previous application for execution, without any reference to the question of *bona fides*.

THE petitioner in this case sought to execute a decree of the High Court dated the 26th of August 1865. It appears that execution had been taken out on the 28th of February 1869, but the case was struck off on the 13th of March 1869. The case was then renewed on the 29th of September 1869, and was struck off on the 16th November following. The next applica-

* Miscellaneous Special Appeal No. 49 of 1874, from an order passed by the Judge of Beerbhoom, dated the 5th December 1873, reversing a decree of the Munsif of Chauki Bolpore, dated the 30th July 1873.

question "Whether a decree-holder, applying for the execution of his decree, is entitled under the existing law to tion for execution was made on the 18th of April 1872, which was struck off on the 16th of December of the same year. Then came the present application for execution on the 11th January 1873. The judgment-debtors contended that execution was barred, inasmuch as the delay between the 29th of September 1869 and the making of the present application had not been sufficiently accounted for, and that mere applications for execution not followed by proper steps were not sufficient to keep the decree alive. The Munsif, considering that execution was not barred, allowed it to proceed. On appeal by the judgment-debtors, the Judge reversed the Munsif's order and held that the decree could not be executed. From that judgment a special appeal was preferred by the decree-holder.

Baboo Rash Behary Ghose for the appellant.

Baboo Gooroo Dass Banerjee for the respondents.

The judgment of the Court was delivered by

MARBLE, J.—As the law applicable to this subject formerly stood, the Court had to enquire when an application for execution was made, whether any proceeding to enforce the decree, or to keep the same in force, had been made within three years prior to that application, and the Full Bench of this Court, in *Ram Sahai Sing v. Sheo Sahi Sing* (1), have laid down that, if a party made an application and neglected to lodge the necessary *talabana*, his neglect would

be evidence from which the Court, upon a subsequent application for execution, would have to decide whether the former application were a *bond fide* one, or merely colorable for the purpose of keeping the decree alive. In all these cases (they say) the Court to which application for execution is made, must decide whether the former application which is relied on was *bond fide* or not, thereby indicating that the true question is, whether the application is *bond fide*. Then they go on to say :—"We cannot lay it down as a rule of law that an application made without lodging *talabana* would not be a *bond fide* application, for it might happen that, immediately after the making of the application, the defendant might die, and it might be necessary, instead of lodging the *talabana*, to make a fresh application for execution against his heir-at-law." These remarks show what is meant by the words *bond fide*, that they are used to describe an application which is not merely colorable, but which is made really for the purpose of keeping the decree alive. If that provision of the law with this construction upon it had governed this case, we should have had to consider the first ground of special appeal, which in substance is this that there was no evidence upon which the Courts could find that these proceedings were merely colorable. But the wording of the new law is different : and the first question which arises is, whether or no the new Statute is applicable to this case. The Act (IX of 1871) provides that it shall come into force on the first day of July

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have such execution upon his showing that his application is made within three years next following a previous application

1871, with a proviso that nothing contained in ss. 2 and 3, or in Parts II and III, shall apply to suits instituted before the first day of April 1873. But it has been pointed out that this is not what in this Act is called a suit, but what is called an application, as appears by the schedules, and that that distinction is made by the Act throughout between applications and suits. This seems to me correct, and I think that, as regards these applications, the Act came into operation on the date on which it came into operation generally, namely, the 1st July 1871 (1). That construction of the Act is not in fact contested by the respondent.

The question therefore is, what is the true construction of the new Law of Limitation which is made applicable to this case. Now, the law provides that the time within which an application is to be made for execution of a decree shall be three years either from the date of the original decree, or if there has been any appeal, from the date of the decree or order of the Appellate Court, or where there has been a review of judgment, from the date of the decision passed on the review; or where the application next thereafter mentioned has been made, from the date of applying to the Court to enforce or keep in force the decree or order. Now the question is, whether we are to read this provision, as the Full Bench read the provisions of the former law, as intending an application made *bona fide* for the purpose of enforcing the decree, and not merely colorable for the purpose of keeping the decree alive. It seems

to me, however, that we cannot so qualify the words of the Statute. I think that, if the Full Bench decision had not existed, there could not, upon these words of the Legislature, have been any doubt whatever that what was intended was that the time should be measured from the specific date there given. No doubt, this language of the Legislature coming as it did upon that Full Bench decision, it would be right to consider whether or no it was intended to set aside the very important principle which the Full Bench decision laid down. I think, however, this is made quite clear by the next paragraph, which runs thus:—

"Where the notice next hereinafter mentioned has been issued, the date of issuing a notice under the Civil Procedure Code, s. 216." Now I think it is clear from that paragraph that the date of issuing a notice is an absolute date from which the time is to be reckoned without any reference to the question of *bona fides*. There is not a single word in that paragraph upon which the consideration of the (so-called) *bona fides* of the application can possibly be imported. If that is so, I think (reverting to the paragraph which we have to interpret) that it must be so in this case also. It is pointed out in the Full Bench decision—*Ram Sahai Sing v. Sheo Sahi Sing* (2) by Sir Barnes Peacock—that issue of the notice is a proceeding, and it is a proceeding which would be sufficient to keep the decree alive if it follows upon a *bona fide* application, for it will then be a proceeding in furtherance of the application previously made to enforce the decree.

(1) See *Nundo Coomar Mookerjee v. Issar Chunder Bhuttacharjee*, 12 B. L. R., App. 3, (2) B. L. R., Sup. Vol., 492.

to the Court to enforce the same decree, or from the date of issuing notice under s. 216 in the same matter."

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The question was referred with the following remarks by

JACKSON, J.—Under the Law of Limitation which governed these matters before Act IX of 1871 came into force, the Courts were held to be bound to ascertain that, within three years next preceeding such application, some proceeding, that is some *bonâ fide* and not colorable proceeding, had been taken to enforce the judgment; and it was held to be a question of fact whether or not the lodging of an application, or the issuing of a notice under s. 216, had been a proceeding *bonâ fide* intended for such purpose, or merely a colorable proceeding. By the now existing Act (IX of 1871), it was declared that, "subject to the provisions contained in ss. 5 to 26, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the 2nd schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence;" and the period of limitation prescribed for execution of decrees or orders of Civil Courts in general is that contained in No. 167 of the 2nd schedule, viz., there

But, on the other hand, if it only follows upon an application which is merely colorable, then within the principle of that decision it would be no proceeding at all. It would be hardly possible, however, to suppose that the Legislature should have intended that an application which was merely colorable should not keep alive the decree, and that a notice following that application which would be in no way better should keep the decree alive. That would almost amount to a contradiction. If therefore there could be any possible doubt upon [the construction of the first paragraph taken alone, there can be no doubt when the two paragraphs are read together that the Legislature intended that there should be two

specific dates from which the three years were to be counted without reference to any enquiry whether the proceedings were taken for the purpose of enforcing the decree or were what the Full Bench called merely colorable for the purpose of keeping the decree alive.

Upon these grounds, therefore, I think that there having been within three years such an application as is prescribed in the new law, it is unnecessary to decide the question which was raised in the first ground of appeal. Upon the second ground of appeal the judgment of the lower Appellate Court will be reversed with costs, and the case will be sent back to the first Court in order that execution may proceed.

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years from the date of the decree or order, or where there is an application made, from the date of applying to the Court to enforce or keep in force the decree or order; or where there is a notice issued, from the date of issuing the notice under the Code of Civil Procedure, s. 216. Now it seems to have been assumed that, because the law requires that every application made after the period of limitation is to be dismissed, the converse is to hold good, and every application made within that period must necessarily be considered to be good. That is the contention of the special appellant, and that has been adopted in a recent case decided by Markby and Mitter, JJ.—*Rohini Nundun Mitter v. Bhogoban Chunder Roy* (1). In that case the learned Judges undoubtedly held that all questions of *bond fides* are now excluded, and a decree-holder is absolutely entitled to have his decree executed, provided he comes within the period specified in No. 167. If that be a true construction of the Act, it would follow that a plaintiff, who obtains a decree for a sum of money with interest perhaps at a large rate, say on the 1st of January 1870, may put in an application on the 1st of January 1873; another on the 1st of January 1876, and so on, taking care only to renew the applications once in three years without taking any further step whatever, without any intention to obtain satisfaction of his decree at the end of three years, and he would be entitled to recover the principal sum and the accumulated interest thereon at that large rate after the lapse of say twenty or thirty years; although his debtor, or the remote descendants of his debtor may have had no notice whatever of any of those applications, and they may have been ignorant of the existence of their liability. It would also follow that a judgment-creditor, who has lodged an application more than one year after the passing of the decree in which circumstance the Court is bound to issue a notice under s. 216, may have omitted or refused to lodge the *talabana* for the service of such notice, and the Court might therefore have been disabled from serving the notice, and yet notwithstanding this clear indication *mala fides* on the part of the decree-holder, the Court would be bound to proceed upon an application made within three years from the date of

the first application. I cannot bring myself to believe that the Legislature intended any such result. I cannot at this present moment recall to mind any section or provision of the Code of Civil Procedure in which express provision is made for a second application to execute a decree, except perhaps the case of inability to obtain satisfaction in the district or in the Court where the decree was made, and, in consequence, necessity of an application to execute it in another jurisdiction. I cannot help thinking that where that is so, the granting of a second application to execute must be, to say the least of it, a matter of discretion with the Court; and it appears to me that the granting or withholding of permission to execute under particular circumstances is a matter quite separate from the limiting of the time within which application must be made; and it by no means follows that, because an application is not to be entertained after the lapse of the time specified, it must, under all circumstances, be entertained if made within that time. It appears to me that, if we are to admit that, the whole doctrine of the Courts in these provinces, as carefully elaborated with the past ten years, is swept away merely by the substitution of a new period or newly defined period of limitation, most disastrous consequences in regard to execution of decrees will follow. There is nothing shown to lead me to say that that was the intention of the Legislature. I think therefore that this very important question, on which I feel at present unable to concur in the decision in the case of *Rohini Nundun Mitter v. Bhogoban Chunder Roy* (1) should be referred for opinion to a Full Bench.

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Baboo Komolakant Sen for the appellant.—There is nothing in the new law to justify the Court in importing the words *bona fide* into cases of execution of decree, whatever reason there might have been under the old law. All that is required is that the application to execute should be made within three years of the application next preceding it. When an application is presented, if it be correct in form, the Court is bound, under s. 15 of Act XXIII of 1861, to order execution of the decree. [JACKSON, J.—

(1) *Ante*, p. 144.

1874 The section says :—"If the application be admitted." That has reference to the informalities mentioned in the section for which the Court may return the application for correction.

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I ask your Lordship's permission to read Mr. Stephen's speech in Council to show what led to the passing of the Act. [Couch, C.J.—We cannot let you read that to explain the law.] The view taken by the learned Judges in *Rohini Nandan Mitter v. Bhogoban Chunder Roy* (1) is, I submit, correct.

Baboo *Probedh Chunder Mitter* for the respondent.—No material change has been made in the law by Act IX of 1871, except that it gives three years from the date of applying to the Court to enforce a decree instead of from the previous proceeding, as in s. 20 of Act XIV of 1859. Nor does the new law in any way alter the provisions of the Code of Civil Procedure which gave a certain discretion to the Court to allow execution or not according as the previous proceedings had been taken *bona fide* or not. The discretion was given by the words of s. 221 :—"The Court, unless it see cause to the contrary, shall issue the proper warrants." The Court always exercised a discretion under the provisions of this Code—*Bam Sahai Sing v. Shoo Shai Sing* (2), and *Byjnath Pundit v. Kunhya Lall Pundit* (3). If the construction contended for, be a correct one, the consequences will be most disastrous as pointed out in the order of reference.

Baboo *Kamolakant Sen* in reply.—The words "unless it see cause to the contrary" mean unless there be gross fraud or some thing of that kind. The disastrous consequences are very easily avoided by the judgment-debtor paying off his debt. It is his fault if he does not pay, and he cannot complain if the decree is kept hanging over his head.

Cur. adv. vult.

The following judgments were delivered by the Full Bench :—

COUCH, C.J. (KEMP, MAREBY, and AINSLIE, JJ., concurring) (after reading the question, referred) :—I think the ques-

(1) *Ante* p. 144.

(2) B. L. R., Sup. Vol., 492.

(3) 9 W. R., 527.

tion must be answered in the affirmative. Act IX of 1871 (the new limitation Act) clearly recognizes a right on the part of a decree-holder to make such an application. No. 167 of the 2nd schedule provides for this case as far as the Law of Limitation applies, and it says "that an application for the execution of a decree or order of any Civil Court not provided for by No. 169," which is intended for Courts established by Royal Charter, is to be made "within three years from the date of the decree or order; or (where there has been an appeal) the date of the final decree or order of the Appellate Court; or (where there has been a review of judgment) the date of the decision passed on the review; or"—this is the part which is material upon the present occasion—" (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce or keep in force the decree or order; or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, s. 216." These words clearly give to the person who has a decree the power, so far as regards the Law of Limitation, of applying for the execution of it within three years from the date, or within three years from the date of the application to the Court to enforce or keep it in force. There is no restriction as to the second or third or any subsequent application. So far then as regards this Act, the decree-holder is not restricted. All that appears necessary for him to do is to take care that the application is within three years from the date of applying to enforce the decree or keep it in force; and he is at liberty within three years from that date to apply again for execution.

The Code of Civil Procedure recognizes there being more than one application to execute a decree. S. 216, which provides for the issuing of notice, says at the end :—"Provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him." S. 15 of Act XXIII of 1861, which is substituted for the provision in Act VIII, says that "the Court, on receiving any application for execution of a decree containing the parti-

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culars mentioned in s. 212 of Act VIII of 1859 or such of them as may be applicable to the case, shall enter a note of the application, and the date on which it was made in the register of the suit. If it shall be shown to the Court that the particulars do not correspond with the original decree, the Court shall either return the application for correction to the person making it, or shall with the consent of such person cause the necessary correction to be made. If the application be admitted the Court shall order execution of the decree according to the nature of the application." Now, it is true that, in s. 221 of Act VIII of 1859, it is said that, "when all the necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree," but what is intended by "cause to the contrary" does not appear in any part of Act VIII; and it might be difficult to say what would be "cause to the contrary" within the meaning of s. 221. In *Davis v. Middleton* (1), Sir Barnes Peacock, speaking of this section, says:—"Looking to the previous sections we do not think it was the intention of the Legislature to control by those words the option of the judgment-creditor. It would be very inconsistent if the Court under s. 15, Act XXIII of 1861, were bound to order the execution, and were not bound under s. 221, Act VIII of 1859, to issue the warrant." The learned Chief Justice appears to have been of opinion that the words of s. 15 of Act XXIII did not leave to the Court a discretion, provided all the previous requisites in the application had been complied with: and in the absence of any further indication in Act VIII of 1859 of what was the intention of the Legislature in using the words "unless it see cause to the contrary," it appears to me that the Courts have not a discretion of granting or refusing a second application for execution. I do not say that this is a desirable state of the law. Indeed, I am far from thinking that it is so. But we have to determine what are the provisions of the Code of Civil Procedure, and not what should be the law. And this leads me to remark that the case of *Byjnath Pundit v. Kunhya Lall Pundit* (2), in which

(1) 8 W. R., 282; see p. 284.

(2) 9 W. R., 527.

Phear, J., after deciding the question before him, expressed his opinion that the Court should not grant the second application as a matter of course, and that the Court should satisfy itself that the failure of the previous execution proceedings is not attributable to the fault of the decree-holder, an opinion in which Sir Charles Hobhouse appears to have been careful not to express his concurrence, is in my judgment a statement rather of what the law ought to be than what it is. We cannot regard that opinion as an authority for the practice in cases of this kind; and it appears to me to be somewhat opposed to the opinion of the late Chief Justice which I have quoted.

I therefore think that we must answer the question in the affirmative. At the same time I think this is not a satisfactory state of the law for the execution of decrees, because it may enable a decree-holder to keep the decree alive for very many years, when he ought not to be allowed to do so.

The decree of the Subordinate Judge will be reversed, and the decree of the Munsif will stand.

JACKSON, J.—I have felt myself bound to assent to the conclusion just announced by the Chief Justice; but, inasmuch as with the concurrence of McDonell, J., I referred this question for consideration of a Full Bench, and inasmuch also as I was a party to the decision of the Full Bench in *Ram Sahai Sing v. Shao, Sahi Sing* (1), and to several other decisions, about that time and subsequently, in which the question of *bona fides* was very much discussed, I think I ought to say a few words upon this question. I am bound to say that I do not feel very much pressed by the difference in language between the present Law of Limitation and Act XIV of 1859, because it seems to me that the doctrine by which the terms of s. 20 of Act XIV of 1859 were explained—the words in that Act being “some proceeding taken to enforce a judgment, decree or order”—might equally well apply to the terms of No. 167 of new the Limitation Act; because if the Court were actuated by the same opinion as was expressed at the time of the case of *Ram Sahai Sing v. Shao Sahi Sing* (1), the words “applying to the Court to enforce or keep in

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(1) B. L. R., Sup. Vol., 492.

1874 force the decree or order" might well have been interpreted to mean applying to the Court *bonà fide* for the purpose of enforcing the decree or order, or keeping the same in force, and not a mere colorable application for the purpose of keeping the decree alive. But inasmuch as this Act has been passed several years after that decision and the following decisions, and as the Legislature must be supposed to have been aware of those decisions, and has, I suppose, designedly omitted to incorporate in the Act the principles of those decisions, I think we ought now to abstain from qualifying the precise terms of the Act by any such doctrine as that introduced in the decision of *Ram Sahai Sing v. Sheo Sahi Sing* (1). In deference therefore to the opinion of the Chief Justice and my other learned colleagues, I assent to the interpretation now put upon the Act. I said in the course of the remarks which I made in referring this case that I could not recall to mind any section or provision of the Code of Civil Procedure in which express provision is made for a second application for executing a decree. I ought no doubt to have referred to the terms of s. 216, although that rather alludes to the making of a second application, because it is impossible to shut one's eyes to the fact that the Code of Civil Procedure and the Limitation Act do expressly recognize, though they omit to regulate the right of a decree-holder to make second and further applications for execution. I still think, and I think more strongly than ever, that the disastrous consequences, to which I referred in my remarks, of removing absolutely all checks to applications for executing decrees are likely to follow; but at the same time I also think it is better that those consequences should be exposed by actual example, and brought to notice in judgments of the Courts, and the remedy left to the Legislature which can properly and effectually deal with them, than that the Courts should by a forced construction endeavour to mitigate by their own authority the action and rigour of the law. I therefore concur in the judgment of the learned Chief Justice, and I hope that these cases and the probable consequences may attract the notice of the Legislature, and may lead to some proper and effectual remedy being applied.

(1) B. L. R., Sup- Vol., 492.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Mitter.

SYED ENAYET HOSSEIN, *alias* DHUNNOO MEAH (PLAINTIFF), v.
MUDDUN MOONEE SHAHOON (ONE OF THE DEFENDANTS).*

1874
Aug 3.

Co-sharers—Payment of Arrears of Revenue by one Co-sharer—Charge on Share of Estate in hands of a Purchaser.

B, the owner of a fractional share in a joint mehal, mortgaged her share to *A*. *A* obtained a decree on her mortgage, and attached *B*'s share in the estate, and afterwards purchased the same at the execution-sale. Whilst her share was under attachment, *B* stopped paying the Government revenue, whereupon the plaintiff, a co-sharer in the estate, paid the whole revenue in order to save the mehal from sale. In a suit brought against *A* and *B* for recovery of the sum paid by the plaintiff on behalf of *B*'s share.

Held, that the plaintiff was entitled to have the sum so paid declared to be a charge upon the share of *B*, which had been transferred to *A*, but not to a personal decree against *A*.

THIS was a suit for the recovery of a sum of money advanced by the plaintiff, a co-sharer in a joint mehal, for arrears of Government revenue, on behalf of the second defendant, who, prior to the transfer of her rights and interests to the first defendant, was owner of the remaining share of the mehal. The plaintiff also prayed for a declaration that the said advance was a charge on the share acquired by the first defendant.

The first defendant was a mortgagee of the second defendant's share. She had recovered a decree upon her mortgage, and attached the aforesaid share. Whilst her share was under attachment, the second defendant withheld the payment of her quota of the Government revenue; the plaintiff thereupon paid the whole of the Government revenue on the mehal in order to save the estate from sale. On the 26th of July 1870, the share of the second defendant was sold in execution of the first defendant's decree, and was purchased by him. The plaintiff there-

* Special Appeal, No. 2010 of 1873, against a decree of the Judge of Zilla Dinagepore, dated the 23rd June 1873, reversing a decree of the Munsif of Maldah, dated the 24th February 1873.

1874 upon brought the present suit. The principal issue upon
 SYED ENAYET HOSSAIN v. MUDDUN MONER SHAHOON. which the case was tried in the Court of first instance was to the following effect :—Whether, or not, the plaintiff was entitled to have it declared that he had a lien over the share of defendant No. 2, purchased by defendant No. 1, for the revenue paid by him on behalf of that share.

The Munsif was of opinion that the plaintiff acquired no lien upon the property by advancing the money to pay the Government revenue. But he was also of opinion that such advance created a debt from the second defendant, and that the first defendant could not have recovered the amount of his mortgage without paying such debt ; he accordingly gave a decree to the plaintiff against the second defendant, at the same time directing that "if the sum cannot be recovered from the defendant No. 2, then it will be recovered from the defendant No. 1." The first defendant appealed to the Judge, who reversed the judgment of the lower Court, holding that the first defendant was not liable for any payment made by the plaintiff for arrears of Government revenue in order to save the whole estate from sale.

On special appeal to the High Court it was urged on behalf of the plaintiff, that as by reason of the payment of the Government revenue by the appellant, the interest of the first defendant as mortgagee and attaching creditor had been protected, she ought, under ss. 69 and 70 of Act IX of 1872, to be held liable for the amount so paid by the plaintiff.

Baboo Kally Kishen Sen for the appellant.

Baboo Doorga Mohun Doss for the respondent.

The judgment of the Court was delivered by

MIRZA, J. (who, after stating the facts, continued) :—The principal contention in this special appeal has been that the lower Appellate Court is in error of law in wholly absolving the defendant No. 1 from any liability. We agree with the District Judge that the defendant No. 1 should not be made personally liable in this case. Although, no doubt, the defendant

No. 1 has been ultimately benefited by this payment, we do not think that that ground alone is sufficient to fix any personal liability upon the defendant No. 1. If that, were so, all the under-tenants whose tenures might have been cancelled by the auction-sale would be equally liable. It appears to us that the defendant No. 1, though benefited, is not personally liable, because it was not her debt that has been paid off. At the time of the payment she simply occupied the position of an attaching creditor in whose decree a lien has been declared. The arrears of the Government revenue of that period was therefore not her debt, but that of defendant No. 2, who was then the proprietor of the mehal. Although we are of opinion, that defendant No. 1 is not personally liable, yet we do not think that it would be equitable to hold that the advance by the plaintiff should not be considered as a charge upon the share of the mehal No. 50, on account of which the revenue was due. If such payment be not considered as a charge upon the property saved from auction-sale, in many cases it would positively result in injustice. For, example, where the mortgagor is really insolvent and the mortgaged property passes absolutely into the ownership of the mortgagee before the person advancing the money is reimbursed his loss. On general principles of equity, therefore, we think we ought to hold that the plaintiff is entitled to a declaration that the money which he advanced is a charge upon the share of the mehal No 50, now in the possession of the defendant No. 1. In the case of *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1) there is a clear expression of opinion of the Judicial Committee in support of this view of the law. Although it is a mere expression of opinion, for the case was decided quite upon a different ground, yet it is entitled to great weight. In that case a mortgagee paid the Government revenue of an estate whilst it was in the possession of a Hindu widow. At the time of this payment, Act I of 1845 was in force, and s. 9 of that Act did not contain a provision to the effect (as the corresponding section of Act XI of 1859 does) that the amount so paid should be added

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(1) 11 Moore's I. A., 241.

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to the amount of the original mortgage. The mortgage after that payment brought a suit against the widow, and obtained a personal decree against her. The widow having died, and the property devolved upon her husband's heirs, and the mortgagee attempting to execute the decree by the sale of the estate saved, was successfully opposed by the heirs in possession. Whereupon, a regular suit was brought for declaration that the money advanced should be declared a charge upon the property. In that case their Lordships of the Judicial Committee make the following observation :—"Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid." Although we do not find any distinct authority directly laying down this principle, yet the case of *Manikmulla Chowdhraim v. Parbuttes Chowdhraim* (1) seems to lend great support to this view of the law.

The result is that the judgment of the lower Appellate Court, wholly dismissing the suit against defendant No. 1 should be set aside, and as against defendant No. 1, the plaintiff should have simply a declaration that the amount advanced by him is a charge upon the share of the mehal No. 50, which has passed to him by auction-sale. Under the circumstance of the case, we think that each party should bear his own costs in this Court and the lower Appellate Court.

Appeal allowed.

(1) S. D. A., 1859, 515.

PRIVY COUNCIL.

GONDA KOOER AND ANOTHER (DEFENDANTS) v. KOOER OODEY SINGH
(PLAINTIFF.)

[On appeal from the High Court of Judicature, North-Western Provinces,
Allahabad.]

P. C.*
1874
March 6, 7,
& 23.

Hindu Law—Widow—Accumulations.

Immoveable property purchased by a Hindu widow with the profits of her husband's estate, there being no proof of any distinct intention on her part to sever such purchases from the estate and appropriate it to herself, held to form part of her husband's estate.

Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick (1) distinguished.

APPEAL from a decision of the High Court at Allahabad, dated 22nd December 1869, affirming a decision of the Subordinate Judge of Meerut, dated 14th September 1869.

One Chowdhry Nem Singh died in 1834 leaving him surviving his widow Khoosal Kooer and his brother Tara Singh. Disputes arose between them, and the widow sued the brother for possession of her husband's estate, and obtained a decree, which was, however, reversed on appeal. On Tara Singh's death, his widow and Nem Singh's widow were jointly recorded as proprietors of the estate, and eventually Khoosal Kooer, as the survivor, was recorded as proprietor of the whole. She died in 1861, and Chowdhry Puddum Singh, the husband of the appellants, obtained possession of her estate as the adopted son of Nem Singh and as the devisee of the will of Khoosal Kooer.

On 11th July 1862, Mohur Singh, (father of the plaintiff); as devisee under a will of Tara Singh, sued Chowdhry Puddum Singh for possession. The case eventually came before the Privy Council (2); and their Lordships found in 1869 that Chowdhry Puddum Singh was not the adopted son of Nem Singh, and that,

*Present, —SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SIMTH,
SIR B. P. COLLIER, AND SIR L. PEEL.

(1) 9 Moore's I. A., 123.

(2) 2 B. L. R., P. C., 101; S. C. 12 Moore's I. A., 350.

1874 on the death of Khoosal Kooer, Mohur Singh and the other heirs
GONDA KOOER in equal degree then living, became entitled to inherit all the
v. estate of Nem Singh of which his widow died possessed.
KOOER OODEY Mohur Singh died pending the appeal and was represented by
SINGH. Kooer Oodey Singh his only son and heir.

The case was remitted to the High Court of Agra to ascertain what share of Nem Singh's estate the said Mohur Singh was entitled to, and what part of the property claimed in the plaint was the estate of Nem Singh. That Court thereupon framed these issues to be tried by the Subordinate Judge of Meerut :—" (i), What share of the estate of Nem Singh Mohur Singh was entitled to ? (ii), What part of the property claimed by the plaint was the estate left by Nem Singh, or added thereto by his widow by the outlay of its profits ?"

On the 14th September 1869, the Subordinate Judge reported to the High Court that the plaintiff had proved his title to one-half of all the property mentioned in the plaint. The High Court in appeal added as parties to the suit Phool Sing, Nutha Singh and Bharut Singh as alleged heirs in equal degree with Mohur Singh ; and the plaintiff in his own right, and as the assignee of the right, title, and interest of the added parties, claimed the whole estate. On 22nd December 1869, the High Court affirmed the judgment of the Court below, and rejecting the objections filed on both sides, decided that the plaintiff was entitled to a moiety of the whole estate mentioned in the plaint. It dismissed the suit as regards the other moiety observing that the plaintiff was at liberty to sue the parties who were said to have assigned to him.

Kooer Nowindh Singh, the son and heir of Chowdhry Puddum Singh, defended the suit, and afterwards appealed to the Privy Council, but subsequently, under a compromise, withdrew his appeal. Thereupon the widows of Puddum Singh, the above-named appellants, were substituted in his place, and claimed their rights as widows in the said estate ; that is to say, they claimed such portions of the property mentioned in the plaint as belonged to Khoosal Kooer, and were by her devised to Puddum Singh.

The main question in the appeal was whether the whole of the property mentioned in the plaint belonged to the estate of

Nem Singh ; or, whether it included acquisitions made by his widow under such circumstances as to render the same her separate estate.

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Mr. Leith, Q.C., and Mr. J. H. Arathoon, for the appellants, contended on the evidence that Khoosal Koor had purchased the disputed items of property from moneys which she had derived from her father. The onus of proof was on the respondent to show whence came the purchase-money. Assuming that the evidence failed to show the source of the purchase-money, and that the correct legal presumption was that she bought the disputed property with the interest and accumulations of her husband's estate, nevertheless the purchases so made were not increments to the estate of the husband, but formed part of the widow's self-acquired property and belonged to her absolutely ; see *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (1). Khoosal Koor being sole widow and heiress according to Hindu law was entitled absolutely to the whole of the income of the estate, and so to use and invest any portions thereof, as she might think fit ; and after such investments were made, they remained her absolute property devisable by will. They were made in her own name, and her intention was to keep them separate from the bulk of the estate and preserve her power of disposition over them. The presumption, at any rate in the absence of evidence, was that such was her intention.

Mr. Bell and Mr. Doynes, for the respondent, contended that the whole estate mentioned in the plaint must be treated as Nem Singh's estate. They argued that the case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (1) was not a binding authority, inasmuch as there was no conflict in that case between the heirs of the widow and the reversionary heirs of the husband ; and the words in the decree as amended by the Privy Council which were the sole ground for regarding that case as an authority for the proposition that the interest and accumulations of her husband's estate, made after his death, belonged to the widow absolutely had passed unnoticed and unchallenged, since there

(1) 9 Moore's I. A., 123.

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SINGH. was no one before the Council to represent the rights of the reversionary heirs of the husband as regarded that interest and those accumulations. Nothing can be the separate property of a Hindu widow which is not her *stridhan*; and the accumulations of her deceased husband's estate in her hands are nowhere included under the definition of *stridhan*.

As to the presumption of Khoosal Koor's intention, she had always upheld the adoption of Puddum Singh, and intended him to succeed to the whole estate, including the accretions. Moreover, Puddum Singh himself had in the pleadings treated these purchases as belonging to the estate of Nem Singh, and his widows were now estopped from setting up a contrary contention. The learned Counsel contended that it was fully established that all the property in the plaint formed part of Nem Singh's estate at the death of his widow, and that the judgments of the Courts below awarding one moiety thereof to the respondent were right in law and in fact.

Mr. Leith, Q.C., replied.

The judgment of their LORDSHIPS was delivered by

Sir R. P. COLLIER.—This suit originated thus :—Chowdhry Mohur Singh in 1862 brought a suit in the nature of an ejectment, claiming the whole of the property, real and personal, of Chowdhry Nem Singh, deceased, as his heir, against Chowdhry Puddum Singh, who claimed to hold it as Nem Singh's adopted son. This suit came by appeal before this Board, which held that the adoption of Puddum Singh had not been proved. The following is an extract from the judgment delivered in the appeal on the 14th of March 1869 :—

" Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit that the appellant is not the duly adopted son of Nem Singh, and that on the death of Khoosal Koor (the widow of Nem Singh), Mohur Singh, the father of the respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of Nem Singh, of which his widow died possessed. And they will recommend to Her Majesty that, with, this declaration, the cause be remitted to the High Court of Agra, to make

such inquiries as shall be necessary to ascertain:—(i) What share of the estate of Nem Singh the said Mohur Singh was entitled to? and (ii) What part of the property claimed by the plaintiff was the estate of Nem Singh P”

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The inquiries thus directed form the subject-matter of the present suit. As to the first, no question now arises, and the second alone has to be dealt with.

The issue on this subject, which the High Court of North-Western Provinces, in order to give effect to Her Majesty's order, settled and sent for trial by the Lower Court, is in these terms:—“What part of the property claimed by the plaintiff was the estate left by Nem Singh, or added thereto by his widow by the outlay of his profits?”

It appeared that Nem Singh, who died in 1834, had inherited some property and had purchased some; and further that his widow, after his death, had purchased a good deal of property. The property in dispute consisted wholly of houses and lands. Khoosal Koor left by will all the property which she had power to dispose of to Puddum Singh.

The right of the present plaintiff Koor Oodey Singh, who represents his late father, to all the property inherited or purchased by Nem Singh, was not denied; the only question arose as to that purchased by his widow. It was contended, on behalf of Puddum and of those who represented him, that his mother had made the purchases in question from property which she had derived from her father, that, consequently, it was her own; and that she had power to dispose of it by will. It was contended on behalf of Koor Oodey Singh, that such purchases had been made from the profits or accumulations of the property of Nem Singh; and this was treated as the only question between the parties in the Court of the Principal Sudder Ameen, and in the High Court. The Principal Sudder Ameen came to no distinct conclusion in this question, and both parties made objections to his judgment. The High Court of the North-Western Provinces thus express themselves on the question.

“With respect to the averment that Khoosal Koor had acquired a portion of the property by means of her own, it is sufficient to remark that there is no proof on the record as to the mode in which she obtained the fund for any such purchases, and that the presumption is that she

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made them from the proceeds of her husband's estate. If her father, said to have been wealthy, had given her the means of making purchases, more clear evidence that he did so should be forthcoming. Nor do we find that any such averment was distinctly made when the suit was heard originally. This being so, we are of opinion that the defendant's objection should be dismissed."

This judgment has been appealed against by the two widows of Puddum Singh, who have been permitted to institute this appeal, a settlement having been come to between the plaintiff and the son of Puddum Singh.

It has not been here contended that the High Court was wrong in finding as a fact that the purchases were made by the widow out of the proceeds of her husband's estate. But a question has been raised at their Lordship's Bar which does not appear to have suggested itself either to the parties or to the Judges in the Courts below.

It has been argued that, assuming the purchases to have made by the widow out of the proceeds of her husband's estate, nevertheless, they do not form increments to that estate, but belong to the widow absolutely and are at her absolute disposal, either by gift in her lifetime or by will. It has been further argued that, even if the presumption be that such purchases are increments to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate, and to treat them as made in her own right, whereupon she acquires the power to dispose of them, and that such intention is proved in this case. The principal authority relied upon by the appellant was *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (1), where it was declared by this Board, varying the decree of the late Supreme Court at Calcutta, that the widow was entitled absolutely in her own right to all such interest and accumulations as, since the death of her deceased husband, had arisen from the one-fifth part of the accumulations which she had before been declared entitled to hold and enjoy as a Hindu widow in the manner prescribed by Hindu law.

Although the decree in that case as so altered made a distinction between the principal funds to which the widow was entitled

as heiress of her husband, and the accumulations of income which had arisen therefrom since his death, and in terms treated her right to the latter as absolute and unqualified, it is nevertheless to be observed that there were no questions in that case as to any conflicting rights between her heirs and the reversionary heirs of her husband. The case, moreover, was governed by the law of Bengal, and the accumulations of income to which the widow was declared absolutely entitled, were the produce of a reserve fund. Their Lordships cannot, therefore, regard this case as a conclusion, or even a direct authority upon the questions raised on this appeal.

In the present case their Lordships are of opinion that Khoosal Koor, who always maintained the validity of her son's adoption as heir to her deceased husband and treated him as entitled to succeed to her husband's property, must be presumed to have intended to make her purchases as accretions to that property; nor do they see any evidence to rebut this presumption. It is true that she made a will in her son's favor but it contains no specific gift of the property in question, and might well have been intended to apply to any property of her own which may have belonged to her as her *stridhan*. That the property in question was understood by Puddum Singh himself to be part of Nem Singh's estate is shown by the pleadings in the original suit in which he claimed it as the adopted son and heir of Nem Singh. It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself, and to sever from the bulk of the estate such purchases as she had made, with the view of conferring them on her adopted son. Their Lordships accordingly see no sufficient ground for reversing the judgment appealed against, and will humbly advise Her Majesty that that judgment be affirmed, and the appeal dismissed with costs.

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Appeal dismissed.

Agent for the appellants : Mr. T. L. Wilson.

Agent for the respondent : Mr. Oehme.

APPELLATE CIVIL.

Before Sir. Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

1874
August 14.

MITTA KUNTH AUDHI CARRY (PLAINTIFF) v. NEERUNJUN
AUDHICARRY AND OTHERS (DEFENDANTS)*

Partition—Joint Ownership in Right of Worship of Idol.

The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns.

Suit for partition of the right to perform the religious services of an idol. The plaint stated that the services in question were originally performed by three Audhicaries (priests), who were partners, viz., Kant Bhoosun, Modhoomam, and the plaintiff himself; that each presided by turns for a year at a time; that the defendant Neerunjun lodged a claim against the plaintiff for a partition of the plaintiff's third share in the rights of the shasters, and obtained a decree on the 16th September 1864; that since that time, the third share had been sub-divided between three partners, viz., the defendants Neerunjun and Lalmootee Dassea, and the plaintiff himself; and that constant disputes had occurred in consequence of their jointly performing the religious ceremonies of the shasters, in order to put a stop to which the plaintiff now sued to enforce the right of performing the duties by turns. The defendant Neerunjun, among other things, urged that no such division of a right to worship an idol could be ordered without the consent of all the sharers; that by the plan proposed by the plaintiff the defendant would only have to perform the duties once every ninth year, and that the plaintiff had brought the suit in concert with Lalmootee Dassea with whom he was living in commensality in view of

* Special Appeal, No. 172. of 1874, against a decree of the Deputy Commissioner of Zilla Goalparah, dated the 11th of November 1873, reversing a decree of the Extra Assistant Commissioner of that District, dated the 17th July 1873.

gaining a double chance of performing his worship. The defendant Lalmootee Dassea stated that the division asked for by the plaintiff would be advantageous to all parties concerned.

The Extra Assistant Commissioner held that the plaintiff might enforce a partition irrespective of the consent of his co-sharers, and that it would be conducive to the benefit of all concerned to let them take the worship by turns.

On appeal, the Deputy Commissioner reversed that decision, and dismissed the plaintiff's suit on the ground that the plaintiff had failed to show that any right of his had been invaded. He further said that there was no proof that the alleged disputes and quarrels took place between the parties, and that even if they did, it was doubtful, whether the Civil Court could entertain such a suit or make such a decree as was asked.

From this judgment the plaintiff preferred a special appeal to the High Court.

Baboo Mohini Mohun Roy for the appellant.—Parties who are jointly entitled to property have a right at any moment to ask that a division be made of that property without showing any grounds; such as the invasion of a right or the the existence of disputes—*Shama Soonderree Dabia v. Jardine Skinner* (1), and

(1) *Before Mr. Justice Norman and Mr. Justice, E. Jackson.*

The judgment of the Court was delivered by

The 13th July 1869.

SHAMA SOONDEREE DABIA (PLAINTIFF) v. JARDINE SKINNER & Co. (DEFENDANTS.)*

Partition, Suit for—Joint Ownership—Right to enforce Partition.

In all cases of joint ownership, each party has a right to demand and enforce partition.

Baboo Sreenath Doss and Mohini Mohun Roy for the appellant.

Mr. R. T. Allan and Baboo Bhoyrub Chunder Benerjee for the respondent.

NORMAN, J.—The plaintiff holds under a patni lease 13 annas 6 gundas 2 cowris 2 krants of an estate called Taruff Kusba in Rajshahye, and the defendants, under a distinct patni granted by co-sharers in the zemindari entitled to such fractional share, hold 2 annas 13 gundas 1 cowri 2 krants in the same estate Taruff Kusba. The plaintiff sues for partition, alleging that she has suffered inconvenience and loss in consequence of the defendant's attempt to enforce the cultivation of indigo.

* Special Appeal, No. 1581 of 1868, against a decree of the Zilla Judge of Rajshahye, dated the 18th March 1868, reversing a decree of the Principal Sudar Ameen of Beaulah, dated 19th September 1867.

1874 the authorities there referred to. The same rule applies also to a joint right to worship a particular idol.

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AUDHCARRY.

v.
NERRUNJUN
AUDHCARRY

Baboo Gopal Lall Mitter for the respondent.—There can be no division of such a right. Each party is entitled to say his prayers and perform his worship at every moment of time, and it would be unjust to deprive any party of that right, unless there

The first Court decreed a partition. The Judge reversed this order and dismissed the suit.

From this decision the plaintiff appeals. Several cases were referred to by the Judge: and one not noticed by him was cited before us—*Benimadhab Bose v. Paerelall Mundul (a)*, *Mothoor Chunder Kormoker v. Manick Chunder Bungo (b)*, *Oomesh Chunder Shaha v. Manick Chunder Bonick (c)*, and *Goures Sunker Roy v. Anund Mohun Moitra (d)*. The Judge attempts to distinguish the present case from those cited, on the ground that the parties here are patnidars. But we think it may be laid down broadly that in all cases of joint ownership, each party has a right to demand and enforce partition. In other words, a right to be placed in a position to enjoy his own right separately, and without interruption or interference by the other; see 1 *Spence's Equitable Jurisdiction of the Court of Chancery*, p. 668; *Story's Equity Jurisprudence*, ss. 648; 649.

The zemindars have nothing to do with this question. They have been made defendants, and had they merely appeared for the protection of their own interests, they would have been entitled to their costs. Those who have appeared and opposed the partition must bear their own

costs. The partition will, of course, not affect the liabilities of the parties under their several contracts with the zemindars.

The decision of the lower Appellate Court must be reversed. The respondents must pay the costs of the appeals in the lower Appellate Court and in this Court.

The case must be remanded to the first Court in order that an Ameen may be appointed to survey, and make a partition as between the plaintiff and the defendants.

On the Ameen making his report either party will be at liberty, if dissatisfied, to except to it in the usual way.

The costs of the suit in the first Court and of the partition are the necessary expenses of obtaining a partition by a decree of Court caused not by any wrongful act of the defendants, but by the nature of the tenancy, *vis.*, a tenancy of the undivided share of an estate. The plaintiff for her own advantage, convenience, and security, is desirous of exercising her right of exchanging her undivided share for an equivalent share of such estate to be held in severalty. The defendants hold subject to the plaintiff's right to demand such partition. The plaintiff and principal defendant must, therefore, each bear their own costs of the suit in the first Court, and the costs of the partition will be divided between the parties in proportion to their respective shares in the estate.

(a) S. D. A., 1853, 536.

(b) 6 W. R., 192.

(c) 8 W. R., 128.

(d) 9 W. R., 487.

was an arrangement between the parties for such an exercise of the right. This suit is like a suit by a party who is one of a number of persons having a right of way, to divide that right so that each may have his turn.

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Baboo *Mohini Mohun Roy* in reply.

The judgment of the Court was delivered by.

COUCH, C.J.—I think that the reasons for which it has here been held that one of several joint owners of property is entitled to a partition apply to this case. The circumstance that it is a right to perform the worship of the idol is not one which deprives any of the joint owners of the right to a partition, and compels the Court to say that they shall be obliged to perform the service jointly, and to undergo the many inconveniences which might arise from such a state of things. In this very case, we have an instance of division having already taken place, and the worship being now performed by three sets of persons by turns.

The Deputy Commissioner appears to me to have misunderstood the nature of the plaintiffs claim. He seems to have thought that there must be an arrangement binding upon the parties that there should be this division. In another part of his judgment, he seems to have thought that there must be proof of disputes and quarrels between them before the Court could interfere to make a partition. It is not necessary that there should be evidence of disputes and quarrels, or of any pecuniary loss or gain as he seems to have thought in another passage of his judgment where he says :—"In reality the decision in suit involves no pecuniary loss or gain, since each sharer would reap the profits arising from the payment made by their disciples in turn." The suit is founded upon the right of the plaintiff, as one of several owners of this which may be described as property, to a partition. No doubt, the plaintiff is entitled to that : and the decree of the first Court was right in awarding it. But that decree has not made provision for the term which each of the three persons, the plaintiff and the two defendants, should have, and does not state whether the plain-

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tiff is to have his turn first, or second, or third. We must therefore direct the Extra Assistant Commissioner to determine by lot in what order the plaintiff and the two defendants shall exercise the right to worship the idol. And having determined that he should insert it in his decree, so that it will be settled in what order they are to exercise the right of worship,

The decree of the Deputy Commissioner will be reversed, and the case will be returned to the Extra Assistant Commissioner for the purpose of completing the decree in that way. The appellant will have his costs.

Appeal allowed.

Before Mr. Justice Phear and Mr. Justice McDonell.

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 August 19.

GUNGADEEN MISSEER AND ANOTHER (DEFENDANTS) v. KHEEROO MUNDUL (PLAINTIFF).*

Sale for Arrears of Revenue—Act XI of 1859, ss. 10, 11 and 13—Separation of Shares—Private Bahwara—Rights of Auction-Purchasers—Suit by Purchaser at Private Sale for Possession specific Share.

The proprietors of a joint mehal, the *jama* of which had been partitioned under s. 10, Act XI of 1859, were in possession of specific shares under a private arrangement among themselves, but had not obtained separation of shares under s. 11. One of the proprietors sold his share to the plaintiff and the shares of two other proprietors who made default in payment of the revenue were sold under s. 13, Act XI of 1859, and purchased by the defendants. In a suit for exclusive possession of the share purchased by the plaintiff, *Held*, that the defendants acquired by their purchase an interest in the property as an undivided estate, and the plaintiff was not entitled as against them to have exclusive possession of any specific share.

The plaintiff acquired by purchase a plot of 25 bigas of land from the fourth defendant, one of the proprietors, of a revenue-paying mehal, the *jama* of which had been partitioned under the provisions of s. 10 of Act XI of 1859. Two

*Special Appeal, No. 2373 of 1873, against a decree of the Subordinate Judge of Zilla Purneah, dated the 11th August 1873, reversing a decree of the Additional Munsif of the Sudder Station of that District, dated the 14th April 1873.

of the proprietors other than plaintiff's vendor having made default in the payment of the Government revenue, their shares were sold under s. 13 of the same Act, and purchased by the first two defendants, of whom one, if not both, was, independently of such purchase, a shareholder in the estate, and had been holding under the arrangement hereinafter mentioned, exclusive possession of a portion of the land as his original share.

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The plaintiff instituted the present suit for exclusive possession by "determination of right" of the plot purchased by him. The plaint alleged that defendant No. 3 was a *jotedar* of the said plot, and that, on the plaintiff calling upon him to give a *kabuliat*, the said defendant, at the instigation of the first two defendants, refused to comply with the plaintiff's demand.

On the case going to trial, it was proved that though a partition of the *jama* had taken place in the Collector's book, no corresponding *batwara* was obtained by the proprietors under s. 11 of Act XI of 1859. It was also proved that the proprietors were in possession of specific shares in the mehal under a private arrangement from a time anterior to the purchase of the plaintiff and the defendants. The Munsif dismissed the plaintiff's suit on the ground that he had not made out his title to hold exclusive possession of the plot purchased by him, no *batwara* of the lands having taken place under s. 11 of the Act.

The Subordinate Judge, on appeal by the plaintiff, reversed the Munsif's order, and passed a decree in favor of the plaintiff.

The defendants appealed specially to the High Court.

Babu Mohesh Chunder Chowdhry, for the appellants, contended that, inasmuch as no separation of shares, consisting of specific portions of the land had taken place under s. 11 of Act XI of 1859, the defendants Nos. 1 and 2, by their purchase at the revenue sale, took an undivided interest in the whole mehal proportionate to the shares of the defaulting shareholder; and the plaintiff was therefore not entitled to the exclusive possession of any specific portion of the property.

Baboo Boodh Sen Sing, for the respondent, contended that

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the private arrangement, under which the proprietors held possession of specific shares prior to the defendants' and plaintiff's purchase, was sufficient, under the law, to transfer to the plaintiff a right to hold exclusive possession of the portion purchased by him.

Baboo Mohesh Chunder Chowdhry in reply.

The judgment of the Court was delivered by.

PHAR, J. (who, after stating the facts, continued).—The question thus appears to be whether the plaintiff as purchaser from one of the shareholders of this mehal, who has until the date of sale been in exclusive possession of the 25 bigas of land which is the subject of suit, together with other land in lieu of his undivided share of the mehal, is entitled to have exclusive possession of that land as against the defendants Nos. 1 and 2, who have bought the share of certain other defaulting proprietors at the Collector's auction-sale. It may perhaps be doubted whether the facts set out in the plaint are quite sufficient to give the plaintiff a good cause of action against the principal defendant. But if it be assumed that they do so, then the question which is to be determined is that which I have just now stated. It is an additional fact in the case that one, if not both, of the two first defendants is (independently of the purchase which they have made at the auction-sale) a shareholder in the estate, and has been holding, and probably now is still holding, exclusive possession of a portion of land as his original share. The plaintiff contends that the defendants Nos. 1 and 2, by their purchase at the auction-sale, got no more than such right of exclusive possession to portions of the mehal as the defaulting shareholders had relative to their co-shareholders; in other words, that they did not, by that purchase, acquire a right to the defaulting shareholder's registered undivided share of the whole mehal. The argument is that, inasmuch as the defaulting shareholders were content to hold exclusively possession of specific portions of the mehal in lieu of their undivided share, the purchaser at the auction-sale, which was held under s. 13, of the share belonging to them only gets those specific portions.

After giving consideration to this subject, we think that the

contention cannot be maintained. S. 10, Act XI of 1859, says that,—“When a recorded sharer of a joint estate, held in common tenancy, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the share held in the estate by the applicant. The Collector shall then cause to be published in his own Office, in the Courts of the Judge, Magistrate (or Joint Magistrate, as the case may be) and Munsif, and in the Police Thannahs in whose jurisdiction the estate or any part thereof is situated, as well as on some conspicuous part of the estate itself, a copy of the application made to him. If, within six weeks from the date of the publication of these notices, no objection is made by any other recorded sharer, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account shall be held to be that from which the separate liabilities of the share of the applicant commence.”

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This section obviously applies to the case of one who wishes to be treated by the Collector as an undivided shareholder of a revenue-paying estate. The following section applies to the case of one who desires to be recorded as a sharer of a joint estate, whose share consists of a specific portion of the land of the estate. The whole of the proprietors of the estate in the present instance, separating themselves substantially into three groups, obtained a corresponding division of the *jama* of the *mehal* under s. 10 and not under s. 11, and therefore the share of each registered group, which the Collector had in his books, and had to deal with, was an undivided share of the entire revenue-paying estate, not a specific portion of the land of the estate. Then s. 13 says that,—“Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid, in the first place, shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due.”

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The section further provides that the share or shares sold, together with the share or shares excluded from the sale, "shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the several separate portions of *jama* assigned thereto."

The effect of this plainly is that the sale of the Collector passes to the purchaser the share of the defaulting shareholder in the entire estate as it was registered in the Collector's book,—i.e., an undivided share, if registered under s. 10, and a specific portion of the estate, if registered under s. 11. In the present case, therefore, it must be an undivided share, and if we were to hold otherwise in the way contended for by the plaintiff,—namely, that the purchaser only got such portion of the land, constituting the estate as the defaulting shareholder may have chosen as between himself and the other shareholders for any reason to take as equivalent to his undivided share, then that portion might, in some cases be a very inadequate security indeed for the proportion of revenue payable by the defaulting shareholder, and the purchaser who bought at the auction-sale under s. 13 might find that he was grossly deceived in his bargain. He might, after having paid the full value on the defaulting shareholder's undivided share in the estate, discover that he got a very inadequate portion of the estate as the result of purchase. It was not the intention, we think, of the Legislature to introduce uncertainty of this kind into auction-sales held for the purpose of realizing the revenue. On the contrary, it is rather the general principle of the Legislature to make these sales effective to pass the full share of the defaulting shareholder, free, so to speak of all incumbrances. We think, therefore, that on the facts of this case, the plaintiff was not entitled as against the defendant Nos. 1 and 2, purchasers of an undivided share of the estate under s. 13 of Act XI of 1859, to have exclusive possession of any portion of the mehal.

It was pressed upon us that, inasmuch as the defendants Nos. 1 and 2 were one or both of them previously shareholders in this estate, and as such enjoying their portion of the land exclusive of the others in the same way as the rest of the share-

holders, there arose an equity in this case as between them and the plaintiff which ought to lead the Court to hold that, at any rate, these defendants got no more than the defaulting shareholder's particular specific share by virtue of their purchase. But we are unable to say that there is any equity arising between the parties on this ground.

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The plaintiff's suit fails, and ought to be dismissed. The first Court held this view, but on appeal to the Subordinate Judge, the decree of the Munsif was reversed, and the plaintiff's suit decreed. We are of opinion that this was wrong, and that the decree of the Subordinate Judge must be reversed and the plaintiff's suit dismissed with costs.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

PROMOTHO DOSSEE v. RADHIKA PERSAUD DUTT AND OTHERS.

1875

Hindu Will—Dedication to Idols—Debutter Property—Perpetuity—Trust.

Jan. 27,

A Hindu by will devised certain property, consisting of a family dwelling house and land, to trustees for ever, for the residence, maintenance and performance of the worship of certain family idols, and appointed his sons and their descendants in the strict male line to be sebaits of the idols for ever, making provision for their residence in the family dwelling-house; the will also contained a clause restraining any partition, division or alienation of the property so dedicated to the worship of the idols. The testator appointed the trustees executors of his will, and by a codicil bequeathed legacies to various members of his family. In a suit against the executors to recover a legacy so bequeathed—

Held, the devise of the property to the idols was void and inoperative, as being a settlement in perpetuity on the male descendants of the testator and for their use, and not a real dedication for the worship of the idols.

Suit for construction of the will of one Moheschunder Dutt, and for an order that the executors thereof should pay to the plaintiff the amount of a legacy bequeathed to her thereby.

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The testator, a Hindu inhabitant of Calcutta, died on 12th February 1868 leaving a widow Soorjeamonee Dossee, two sons, Radhika Persaud and Rajendernath, a grandson Nillambur, and four daughters, and having made a will in the English form and language, of which he appointed his two sons and his grandson the executors and residuary legatees and devisees. By this will, after giving directions as to the payment of his debts, and testamentary expenses, and making various bequests, and after reciting that he was possessed of a family, dwelling-house, No. 124—26, Manick Bose's Lane, Durmahatta, with land adjoining, in which house the daily and periodical worship of his ancestral deities was performed, and in which he resided with his family; and also of a two-storied godown, No. 124, in Durmahatta Street, with land, on the bank of the river Hooghly, and that in order to fix a permanent residence for the idols and for the sebais thereof, and for the members of the family, and to make a permanent provision for the daily and periodical worship of the idols, he had determined to appoint sebais after his death for the performance of the said worship, the testator continued:

"I do therefore give, devise, and bequeath my family dwelling-house in Manick Bose's Lane aforesaid, together with the piece or parcel of land or ground thereunto belonging, and the said *batikakshana* *dati* and premises in Durmahatta Street aforesaid, with the piece or parcel of land thereunto attached, with its appurtenances, unto my sons, Radhika Persaud Dutt and Rajendernath Dutt, and my grandson Nillambur Dutt, and the survivors or survivor of them, their or his heirs, representatives, and assigns for ever, upon trust, that they the said, trustees and the survivors and survivor of them or the heirs, executors and representatives of the survivor, do and shall stand and be seized of the said family dwelling-house and premises with the appurtenances upon trust, to hold and enjoy the same for and as the permanent residence of the said deities and of my said wife and my three widow daughters-in-law for and during the term of their natural lives, and of my sons Radhika Persaud Dutt and Rajendernath Dutt, and of my grandson Nillambur Dutt, and their and each of their families and descendants in manner following.—that is to say, that the trustees or trustee for the time being shall and will employ such portions of the said family dwelling-house for the performance of the daily and periodical

worship of the said four ancestral deities, and for the performance of the annual *pujas* as have been hitherto used for such purposes.

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(After making provision for the residence of the various members of his family in the portions of the house hitherto occupied by them, the testator continued) :—

And my said trustees and trustee for the time being shall and will let out such portions of the said family dwelling-house as used to be let by me, and also the said *baithakhana* house and land on the banks of the river, and out of the rents, issues, and profits thereof pay the ground rent and assessment, and all other taxes and impositions in respect thereof, and also all the expenses of repairing the same, and all the expenses incidental to the collection of such rent, and employ and appropriate the clear rent, produce, and profits thereof in and towards the performance of the daily and periodical worship of the said deities, and for the performance of the above-mentioned *pujas*, and the surplus (if any) which shall remain after defraying all the expenses above-mentioned shall be divided by and between my sons and grandson, and their and his heirs and representatives in equal shares : and I do hereby appoint my said wife Sremutty Soorjeemonee Dossee and my sons Radhika Persaud Dutt and Rajendernath Dutt, and my grandson Nillambur Dutt, or the sons of my sons who may have died before me, and their and his respective male descendants in the strict male line to be the *sebaits* of the said deities, after my death to perform the daily and periodical worship of the said deities, and to perform the several *pujas* hereinbefore-mentioned ; and I do hereby declare that when and so often as any of my trustees above-named shall die in the office of trustee under this my will, I hereby nominate and appoint any other male member or members in the strict male line of my family who may be then adult to be a new trustee or trustees to supply such vacancy or vacancies, and that every such new trustee or trustees shall have and may exercise all the powers and authorities contained in this my will as effectually and in the same manner to all intents and purposes as if he or they had been named herein. And I do hereby expressly declare that no male issue as aforesaid of any of the said *sebaits* or *sebaits* during the lifetime of their or his father, but shall, on the death of such father *sebaits*, succeed to and represent him or them in the worship, but that in case any *sebaits* of the worship hereby appointed shall die without leaving male issue, or leaving such, shall die without leaving any descendants in the strict male line as aforesaid, the worship of such of them shall devolve and be performed by the said survivor

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of them, my said son, and grandson and their and his descendants in the strict male line as aforesaid for ever ; and I expressly will and declare that no one whosoever shall have any power or authority to make a partition or division of, or to mortgage, transfer, make gift of, or make over, or sell, alien, or otherwise dispose of or incumber the said family dwelling-house and the *baithakhana bati* and premises, or any part thereof respectively, or the gold and silver jewels or ornaments of the deities and other furniture used and appropriated for the daily and periodical worship, and festivals of the said deities, and for the said *pujas*, and that the same shall not, nor shall any part thereof, be liable to be seized, attached or sold for the debts, engagements or any liabilities of any one whomsoever, but the same shall be and remain all along wholly and absolutely free and unincumbered, and be considered debuttur property appropriated for the use and permanent residence of the said deities and of the *sebaits* thereof, and as and for the permanent provision for the *seba* or worship of the said deities, and for the permanent residence of the *sebaits*, and my family and descendants as hereinbefore mentioned, and the legal estate in the said family dwelling house and land with the premises and appurtenances shall remain vested in the trustees or trustee for the time being upon and subject to the trusts aforesaid and not otherwise."

By a codicil to his will the testator bequeathed (among other legacies) the sum of Rs. 1,000 to his executors upon trust to pay and expend the same for the marriage expenses of the plaintiff, his daughter Promotho Dossee. The will and codicil were duly proved by the executors, against whom the present suit was brought to recover the legacy bequeathed in the codicil.

The plaint prayed that the will should be construed ; that the defendants should be ordered to pay the amount of the legacy, or if they did not admit sufficient assets of the testator's estate to enable them to do so, that an account should be taken, and if on taking such account it was found there were not sufficient funds to pay the legacy, that a sufficient portion of the real estate should be sold for that purpose.

The defendants admitted the legacy was due, and that they were liable to pay it, but alleged that they had not sufficient assets of the testator to enable them to do so.

The only material question was whether the provisions of the

will containing the dedication of the property were not void as tending to create a perpetuity.

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Mr. Kennedy and Mr. Piffard for the plaintiff.

- Mr. Macrae (Mr. Franson with him) for the defendants.

It was contended for the plaintiff that the will, as far as it provided for a dedication to the idols, and as far as it restrained alienation of the property, was void and inoperative; and that the defendants, therefore, as heirs and legal representatives of the testator had power to sell a portion of the property sufficient to pay legacies bequeathed in the will.

For the defendants it was admitted that the devise to the idols was bad; but they submitted that some provision must be made for the expense of maintaining and for the worship of the idols.

MAGPHERSON, J., was of opinion that the will, except with regard to the legacies, was bad as tending to create a perpetuity, and as not being a real dedication to the idols, and accordingly made the following decree:—

That the devise of the property to trustees for ever for the worship and residence of the idols, and of the sebais thereof, and for the residence of the male descendants of the testator for ever, is ineffectual and void, as being in fact a settlement on his male descendants for ever, and for their use, and not a real dedication for the worship of the idols; that the testator died intestate in respect of the said property; that (by consent) an account of the debts and legacies be taken by the Registrar; that the house No. 124—26, Manick Bose's Lane, be sold by the Registrar for payment of the costs when taxed, and the debts and legacies of the testator; that the idols be kept in No. 124, Durmahatta Street, and that the income derivable from that house and land be applied towards the expenses of the worship of the idols, and that the costs of the suit be paid out of the estate.

Attorney for the plaintiff: Baboo W. C. Bonnerjee.

Attorney for the Defendants: Baboo P. N. Ghose.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex.

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Jany. 4.

C: FORNARO AND ANOTHER v. RAMNARAIN SOOKDER.

*Small Cause Court—Reference to High Court—Deposit of Security for Costs
—Act XXVI of 1864, s. 8.*

A case should not be referred to the High Court by a Judge of the Small Cause Court, until security has been deposited in accordance with s. 8, Act XXVI of 1864, by the party against whom the judgment has been given. If such party do not deposit the security "forthwith" he must be taken to submit to the judgment of the Small Cause Court.

When, however, a case was sent up without security for costs being deposited, and before the case was heard, the plaintiffs tendered a sum as security, which the Judge refused to accept as being too late, the High Court, on the sum being deposited, and it appearing that the defendant would not be prejudiced by such a course, allowed the case to be heard.

CASE stated for the opinion of the High Court by the first Judge of the Calcutta Small Cause Court, under s. 7, Act XXVI of 1864.

This was a suit for Rs. 1,000, as compensation for loss caused by a breach of warranty in a contract. The learned Judge gave judgment dismissing the suit contingent on the opinion of the High Court on several questions referred at the request of the plaintiff. The judgment of the Small Cause Court was given in July 1874, and was sent up to the High Court with a note appended by the Judge, that "no costs of reference have been paid into this Court as security under s. 8, Act XXVI of 1864." On 16th December the plaintiff tendered a sum as the security for costs, but the Judge refused to accept it on the ground that it was offered too late. The following certificate of the tender and of his refusal was sent up to the High Court by the Judge on 17th December.

"I certify that the plaintiffs tendered yesterday the sum of Rs. 230 as security for costs of reference in the case of Fornaro v. Ramnarain Sookdeh, and that I refused to accept the same as being offered too late. I give this certificate because, in the year 1869, in the case of *Clarke v. Agra Bank* (1), an

opinion was hesitatingly expressed by PHEAR, J., that the deposit of security for costs was not a condition precedent to this Court's granting a reference, but there have subsequently *vis.*, in the cases of *Rajkumar Paramanik v. Stewart* (1), and *Dissent v. The Justices of Calcutta* (2), been contrary decisions by the High Court, from which it would appear that that Court is finally of opinion that it has no jurisdiction on a reference, until after the conditions stated in s. 8 of Act XXVI of 1864 have been first complied with, and because it has always seemed to me that the effect of the word 'forthwith' was to render the prior deposit of security for costs imperative, and it would save the time of both Courts if it were distinctly ruled that, under such circumstances, it should not be referred."

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At the hearing the question arose whether the case was properly before the Court.

Mr. Macrae for the plaintiff.—The non-deposit of the security for costs in accordance with s. 8, Act XXVI of 1864, might be a reason why the Judge should not send up the case to the High Court, but when, as here, he has sent up the case, and it is in other respects properly before the Court, the mere non-deposit is no ground why it should not be heard and disposed of. No definite time was ever fixed for depositing security for costs; see *Rajkumar Paramanik v. Stewart* (1) and *Dissent v. The Justices of Calcutta* (2). The defendants now appear, and by doing so waive any question of the jurisdiction of the Court to hear the case. Act XXVI of 1864 does not take away the jurisdiction of the High Court to hear the case, or the power of the Judge to reserve a question, if the security is not deposited "forthwith" [PONTIFEX, J.—Although s. 7 says the Judge shall reserve the question, it does not say he shall send it up.] But having sent it up, and security being now ready, will the Court refuse to hear the reference? [COUCH, C.J.—You are in fact appearing without having given security.] Because our offer of security was refused: that may have been a reason for the Judge's not sending up the case, but the case being here, is it a reason for the Court refusing to hear it?

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Mr, *Branson* for the defendant.—The plaintiff's omission to deposit the security for costs necessary before the case could be sent up, gives ground for the inference that he submitted to the judgment of the Small Cause Court. The Judge had no power to send up the case unless security was deposited, and as he has done so, it is not properly before the Court. The word "forthwith" in s. 8, Act XXVI of 1864, must mean within a reasonable time. Here the delay is most unreasonable.

COUCH, C.J. (PONTIFEX, J., concurring).—This case is referred to this Court under the provisions of the 7th and 8th section of Act XXVI of 1864. The 7th section obliges the Small Cause Court, in a suit of an amount exceeding Rs. 500, to reserve for the opinion of the High Court any question of law or equity, or any question as to the admission or rejection of any evidence as to which the Court shall entertain any doubt, or which they shall be requested by either party to the suit to reserve; and the 8th section provides that when judgment is given contingent upon the opinion of the High Court, the party against whom judgment is given shall, unless willing to submit to such judgment "forthwith" give security for the costs of the reference, and for the amount of the judgment. It was, I think, clearly the intention of the Legislature that the case should not be sent to this Court until the party against whom judgment was given had given the security here mentioned. Unless he did so, he was to be taken as submitting to the judgment, and it was the duty of the Small Cause Court, before sending the case to this Court, to see that the security was given.

In the present instance this was not done. The First Judge of the Small Cause Court states the case, and causes it to be sent to this Court, appending to it a note that no costs of reference had been paid into his Court as security under s. 8 of Act XXVI of 1864. What was his object in making this note is not clear. Whether he intended, as possibly he did from what appears in the certificate that he afterwards gave to have it decided by this Court, what was the effect of not giving the security, there being, as he thought, some conflict of opinion, or to

call the attention of this Court to the fact, that security had not been given, so that proper measures might be taken to enforce its being given is not quite apparent. But he ought, instead of sending the case in this manner, to have kept it until the security was given, and if it was not given within a time which came within the definition of the word "forthwith," he ought not to have sent up the case.

As I have already said, instead of doing that, the Judge of the Small Cause Court has sent the case to this Court. And we have also received from him a certificate that the plaintiffs, on the 16th of December, tendered Rs. 230 as a security for the costs of the reference, and that he refused to accept it, as being offered too late.

Having sent the case to us, I am not certain that he had power to accept the security, even if he had thought fit to do so, and that he had not by his conduct placed the matter in the hands of this Court. By sending the case, as he did, the plaintiffs may have been prejudiced, and led to suppose that it would be sufficient if they gave the security at any time; that the Judge of the Small Cause Court had shown that the direction that the security should be given was not to be insisted upon. From what he had done, it might be inferred that the plaintiffs did not submit to the judgment, and that the case was to be determined by the opinion of this Court. And this went on for a considerable time until apparently it came to be understood by the plaintiffs, or their advisers, that the security had not been given, and that there was thus a difficulty in the way of the case being heard, when they immediately offered the money. If the security be given now, the defendants will not be prejudiced by the delay. They will be in the same position as regards the having security for the costs as they would have been in if it had been first given. If there should be any question of allowance of interest or as to costs, we can take into consideration the delay which there has been in the plaintiffs giving security. On looking at the manner in which this case has been dealt with by the Judge of the Small Cause Court, we thought that it was a case in which we might allow the plaintiffs to appear, and argue the case upon the security

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being now given which was done to the satisfaction of the defendant's Counsel.

(The Court then proceeded to consider the questions referred, and gave its opinion in favor of the defendant, and continued.)

The defendants are entitled to the judgment which has been given by the Judge of the Small Cause Court ; that judgment will stand, and the defendants will have the costs of reserving the question and the costs consequent thereon. The sum deposited will be retained to satisfy them.

Attorney for the plaintiffs : Mr. *Hechle*.

Attorneys for the defendant : Messrs. *Swinhoe, Law, and Co.*

[TESTAMENTARY AND INTESTATE.]

Before Mr. Justice Pontifex.

1875

Jan. 7.

IN THE GOODS OF JOYMONEY DOSSEE, DECEASED.

Court Fees Act (VII of 1870), Sched. i, cl. 11—Letters of Administration—Estate of Hindu in hands of deceased Daughter's Representatives—Trust Property.

On the death of a Hindu lady who had succeeded to her father's property for the estate of a Hindu daughter, it appeared that certain Government promissory notes which formed a portion of the father's property, were then standing in her own name. On an application by the sons for letters of administration to her estate, *Held* that, on her death, the grandfather's estate became in the hands of her representatives trust property in respect of which no duty was payable under the Court Fees Act.

HEERA LALL MULLICK, a Hindu, died intestate, possessed of considerable property, both moveable and immoveable, a large portion of which consisted of Government securities ; and leaving him surviving as his sole heiress a daughter Joymoney Dossee. Joymoney took possession of her father's property for the estate of a Hindu daughter ; and subsequently died intestate, leaving her husband, four daughters, and two sons, Hurry Doss Dutt and Singhee Churn Dutt, her surviving. Upon her death, her sons applied for letters of administration to her estate. In their application they stated that the whole of the Government securities which had been part of the estate of Heera Lall Mullick, stood

at Joymoney's death in her name ; that they, as the sole heirs and legal personal representatives of their grandfather, became, on their mother's death, entitled to his estate ;—but that they were unable to transfer the Government promissory notes which stood in the name of Joymoney into their own names, or to otherwise deal with them as the rightful owners thereof on the termination of Joymoney's life-interest as a Hindu daughter, or to obtain payment of the rents and profits accrued or to accrue on the immoveable property. They also stated that Joymoney left certain *stridhan*, of which they, as her sons and heirs, had already obtained possession. They, accordingly, applied for letters of administration to Joymoney's estate limited to the purposes above-mentioned, and prayed that, under the circumstances stated in their application, such administration might be granted to them on their entering into a security bond for a nominal amount only.

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Mr. *Woodroffe* in support of the application.—On Joymoney's death the estate of Heera Lall Mullick must be treated as trust property in the hands of her representative ; the applicants are, therefore, entitled to administration on furnishing nominal security. Originally, the law under the Court Fees Act was that an *ad valorem* fee was payable in respect of property which the deceased was possessed of or entitled to—*In the Goods of George* (1); the law in fact was the same as the English law as laid down in *Drake v. Attorney-General* (2). Subsequently, the term "property," in cls. 11 & 12 of sched. i of the Act, was declared to include not only property to which the deceased was beneficially entitled, but also all property which stood in his name as trustee, or of which he was possessed benami for others—*In the Goods of Beresford* (3). Then the Government of India laid down that neither probate nor administration stamp was payable in respect of property to which the deceased was entitled as trustee, and not beneficially ; see the Financial Resolution No. 2004, of the 14th July 1871 (4). In order to ascertain the value of property under mortgage or other incumbrances for the purpose of *ad valorem* duty, the value of the propertyless the mortgage is to

(1) 6 B. L. R., App., 138.

(3) 7 B. L. R., 57.

(2) 10 Cl. & Fin., 257.

(4) *Gazette of India* for 1871, Pt. i., 525.

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be ascertained—*In the Goods of Innes* (1). Where there are two brothers, Hindus, joint in estate, and the joint property stands in the name of one A, but belongs to A and B in equal shares, and A dies leaving B his surviving brother, his heir and personal representative, B is entitled to an order for letters of administration of the estate and effects of A on payment of the *ad valorem* duty on A's moiety; B's half share in the property held by A being treated as trust property—*In the Goods of Brindaban Ghose* (2). That case is very similar to the present one; here, the applicants are absolutely entitled to the estate left by Heera Lall Mullick, and Joymoney's representatives are, as regards the applicants, only trustees of it. The Government will not issue a Government Promissory note carrying on the face of it notice of a trust, and upon payment of interest such payment must be endorsed on the back of the note—*Monmohinee Debi v. Secretary of State* (3). The Loan Office has made a rule under which it refuses to recognize the applicants as the representatives of Heera Lall Mullick, unless they obtain letters of administration (4).

Cur. adv. vult.

Subsequently an order, of which the following is the material portion, was made by

PONTIFEX, J.—This Court doth declare that the estate and effects to which the said Sreemutty Joymoney Dossee, deceased, had, during her life, been entitled for the estate of a Hindu daughter, became and were on her death in the hands of her representatives trust property, in respect of which no duty was or is payable under the provisions of the Court Fees Act by the persons entitled to administer to her, the said deceased's, estate and effects.

Attorneys for the applicants : Messrs. *Booby and Rutter*.

(1) 8 B. L. R., App., 43.

(2) 11 B. L. R., App., 39.

(3) 13 B. L. R., 359; see pp. 362, 363.

(4) The rule referred to is in the following terms :—“That representatives of the estates of deceased persons are ordinarily required, in the first instance, to establish title through a com-

petent Court before they can be recognized by the Loan Department, either by probate or letters of administration obtained through the Supreme Court, if the estate be under its jurisdiction; or if otherwise, by a certificate of administration under Act XXVII of 1860.”

PRIVY COUNCIL.

GIRDHAREE LALL AND ANOTHER (TWO OF THE DEFENDANTS) v.
KANTOO LALL AND OTHERS (PLAINTIFFS);

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AND

MUDDUN THAKOOR (ONE OF THE DEFENDANTS) v. KANTOO LALL
AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Mithila—Son's Interest in ancestral Estate.

Ancestral property which descends to a father under the Mithila law is not exempted from liability to pay his debts because a son is born to him. Such exemption can only be pleaded when the nature of the debts incurred by the father is such as would free the son from the usual obligation of discharging his father's debts out of the ancestral estate. See also
15 B.L.R. 270

A decree, properly obtained against the father, can be executed by sale of such ancestral estate, and the interest of the sons as well as of the father will be bound by it. A purchaser at such sale is not bound to inquire into the circumstances under which the decree was made.

APPEALS from a decision of the High Court of Calcutta (Kemp and E. Jackson, JJ.) dated 16th April 1868, varying a decision of the Principal Sudder Ameen of Bhagulpore, dated the 21st December 1866.

The facts were as follows:—One Kunhya Lall, a Hindu, subject to the Mithila Law, died in 1842, leaving certain self-acquired property, consisting of a talook Nawalgawan and Akha Amanat Sarkar in Pergunna Chayen, a 5-anna share in Kramut Rajpore and Alinuggur, and two Mauzas Anundpore

* Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, SIR
B. P. COLLIER, AND SIR L. PEARL.

1874 Manickpore and Pall Layadut. He left him surviving two
 GIRDHAREE sons as his joint heirs, according to Hindu law, Bhikaree Lall
 LALL and Bujrung Sahye, the latter being a minor at the time of
 v. his father's death. On the death of Kunhya Lall, his son
 KANTOO LALL. Bhikaree Lall became and continued to act as, manager of the
 MUDDUN joint family, and his name, both in his own right and as gaurdian
 THAKOOR of Bujrung, was, on 25th February 1843, entered in the Collec-
 v. tor's books in the place of Kunhya Lall in respect of the property.
 KANTOO LALL. Bhikaree Lall had only one son who survived, viz., Kantoo
 Lall who was born according to the defendant's account in 1844
 and according to the plaintiff's in 1848. Bujrung had one
 son, Mahabeer Persad, born in November 1858.

Kunhya Lall died considerably indebted, and, after his death, considerable expenditure was incurred at various times by Bhikaree Lall for his father's *shraddh*, and the *shraddh* of his mother and other members of the family and for other family ceremonies; and in order to defray these expenses, large sums were from time to time borrowed from various persons by Bhikaree Lall. Among other transactions, he gave a bond, on 24th February 1851, to secure the sum of Rs. 1,100 borrowed from one Matee Sahu.

On 14th January 1856, one of the creditors, Byjnath Chuckerbutty, obtained a decree against Bhikaree Lall on a bond for Rs. 500 with interest and costs, and in execution thereof attached the dwelling-house of the joint family: and, in order to stay the sale and to pay the other debts contracted as before-mentioned, Bhikaree Lall, as manager of the joint family, as guardian of Kantoo Lall, and with the concurrence of Bujrung executed a deed of sale of talooks Nawalgawan and Akha Amanat Sarkar to Girdharee Lall and Runjeet Panday, on 28th July 1856, for the sum of Rs. 5,750 which was expended in paying off Byjnath's decree, and in paying the revenue due on the ancestral estate.

In February 1855, about three years previous to the birth of Mahabeer Persad, Bhikaree Lall and Bujrung Sahye mortgaged the 5-anna share in Kismut Rajpore, and Alinuggur and the two Mauzas Anundpore Manickpore and Pall Layadut, to secure the sum of Rs. 3,540 for which the mortgagors gave

a joint bond. In execution of a decree obtained in a suit on this bond, these lands were, on 6th September 1858, also before the birth of Mahabeer Persad, sold by auction under Act IV of 1846, and purchased by one Muddun Chand Dass whose name was registered as proprietor. Subsequently, the Government revenue in the estate having fallen into arrear, these lands were sold under Act XI of 1859 in two parcels on 28th March and 8th June 1860, and purchased by one Muddun Thakoor who was thereupon put in possession.

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Other alienations of portions of the property were made at various times by the two brothers Bhikaree and Bujrung.

On 19th March 1866, Kantoo Lall and Doolaroo Koonwaree (as mother and guardian of Mahabeer Persad), in order to raise the costs necessary for bringing the present suit, sold to Mussamut Gora Sahun, a 4-anna undivided share of the whole of the property with the family dwelling-house for Rs. 5,000.

The present suit was instituted in the Court of the Principal Sudder Ameen of Bhagnapore on 13th April 1866 by Kantoo Lall, Mussamut Doolaroo Koonwaree (on behalf of Mahabeer Persad) and Mussamut Gora Sahun, against Girdharee Lall, Runjeet Panday, Matee Sahun, Muddun Thakoor, Bhikaree Lall and his brother Bujrung Sahye and fourteen other defendants, in order to obtain, from the several defendants, other than Bhikaree Lall and Bujrung Sahye, possession of a certain undivided share in the several parcels of land which had been at different times and under different circumstances, as before stated, sold by the said Bhikaree Lall and Bujrung Sahye to their co-defendants. One Gunesh Sahu was subsequently made a co-plaintiff in the suit upon a statement that Mussamut Gora Sahun was, as such purchaser of a 4-anna share as aforesaid, merely his nominee and *benami* for him.

The plaint contained charges to the effect that the said sale was made to pay debts incurred by Bhikaree Lall and Bujrung Sahye through extravagance and immorality, and to provide funds for like purposes, and to defraud Kantoo Lall and Mahabeer Persad of their rights in the property as sons.

The defendants, Girdharee Lall and Runjeet Panday, on the other hand, maintained, first, that the said Mahabeer Persad was

1874 unborn at the time of sale, and therefore, under any circumstances, could not be entitled to claim any right or to sue; and secondly, that, if the other sons had any rights under the Mithila shasters in the property, the fathers were not guilty of extravagance or immorality, and that the sale was not made to supply means for those purposes, but was made under urgent necessity to satisfy the said decree and execution, and other debts and liabilities of the joint family, and that some of such other debts had been contracted to enable the said fathers to purchase other lands for the joint family which were added to the ancestral estate, and were in fact claimed as part of such estate by the plaintiffs, while others of those debts were contracted in order that those two persons, as heads of the joint family, might be able to perform in a proper manner the funeral rites and marriage and other ceremonies of the various members of the said joint family, and also to defray other expenses necessary for the support and requirements and comfort of the said joint family, among which latter was especially mentioned the payment of Government revenue.

On the 31st December 1866, the Principal Sudder Ameen of Bhagulpore found and decided that the charges of extravagance and immorality made by the plaintiffs had not been proved; that the sale to the defendants, Girdharee Lall and Runjeet Sing, was made, and part of the purchase-money actually applied, in order to satisfy the decree obtained by Byjnath; that the greatest portion of the purchase-money had been clearly shown to have been expended on purposes which must be considered as originating in a legal necessity; and that the sale was therefore valid and binding on all the members of the said joint family.

On appeal by the plaintiffs, the High Court, on 16th April 1868, held that under the Mithila law a son had, even in his father's lifetime, an ownership in property which had descended from the grandfather, and, proceeding to consider 'the nature of such ownership, stated that there was no "direct clause in the Vivada Chintamani which allows a son to force his father to a partition of ancestral property in his father's lifetime," and that as to certain property, the father was his own master and could act as he pleased; it then continued:—

"As regards ancestral landed property he does not possess the same right, because the son has an ownership in such property. For the purposes of this suit, however, it is necessary also to determine at what time the ownership of the son commences, whether at his birth, or after a partition has been made, either with the consent of the father or against his consent. The Vivada Chintamani not laying down any rule upon the point, we must decide this point also on the Mitakshara, and there it is laid down that the ownership accrues on the son's birth, and that the son and father are joint owners in such property from the son's birth; and it has been held by several Benches of this Court, after some difference of opinion, that the son can compel his father to divide such property whenever he pleases. Applying these principles to this case, the sons may, we think, be considered in this case to be suing to obtain their share of their grandfather's property. The fathers are parties to the suit as the defendants, though, as they have alienated the estates, they do not oppose the sons. However repugnant at first sight it may appear to principles of justice and equity that the sons should be allowed to recover landed estates which the fathers have sold, still if the right of the father to sell any portion of such estate can be questioned under the law, and the right of the son to a portion of such estate is clear under that law, the sons must recover."

On the merits of the case, the High Court was of opinion that there was no sufficient evidence that the money for which the estates were sold was expended for immoral purposes, but that there was "no evidence to show that the fathers required to raise money for any pressing necessity for the benefit of the family;" that it was admitted that the sales of all such estates as were sold by either father previous to the birth of his son were valid and good, and it held that as to the lands in Nawalgawan and Akha purchased by Girdharee Lall and Runjeet Panday on the 19th July 1856, no claim on the part of Mahabeer Persad could be held valid, the purchase being before his birth; but that as to the share of Bhikaree Lall, although some small portion of the debt was incurred on account of payment of Government revenue, the greater portion was to pay off loans, and therefore there was not a sufficient necessity shown for the sale, and the plaintiff, Kantoo Lall, could recover to the extent of 4 annas, viz., one-half of his father's share.

Girdharee Lall and Runjeet Panday were ordered to pay their

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1874 own costs, but not any part of those of the plaintiffs, nor anything by way of mesne profits.

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KANTOO LALL. From this decision, the defendants, Girdharee Lall and Runjeet Panday, appealed to Her Majesty in Council.

MUDDUN THAKOOR
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KANTOO LALL. The second appeal was by Muddun Thakoor, the fourth defendant in the suit, which so far as this defendant was concerned, was based upon allegations and charges on the part of the plaintiffs to the effect that the mortgage to him was made in order to raise money to enable the two fathers of the principal plaintiffs to live in extravagance and immorality and so to defraud Kantoo Lall and Mahabeer Persad of their alleged rights or interest in the lands as their sons and heirs; and that the money raised was actually spent in reckless extravagance and immorality. It was also alleged that Muddun Chand Dass was in respect of the first purchase *benami* for Muddun Thakoor, and that the payment of the revenue had been withheld in order to obtain a title under the Government sale.

The contentions raised by the defendant Muddun Thakoor was substantially the same as those raised by the defendants Girdharee Lall and Runjeet Panday; but in addition thereto he urged, first, that the onus lay upon the plaintiffs to prove expressly that the debt had been contracted for an immoral purpose, as charged in the plaint; and, secondly, that under any circumstances, Muddun Chand Dass having bought for his own private benefit, and the Government sale having been for arrears of Government revenue, he, Muddun Thakoor, had acquired a good title to the lands as purchaser thereat. The Principal Sudder Ameen decided adversely to the plaintiffs as before stated, but the High Court reversed that decision so far at least as regards the lands the subject of this appeal, holding that the alienation to Muddun Thakoor was not justified as against Kantoo Lall.

The defendant, Muddun Thakoor, appealed to Her Majesty in Council.

The two appeals were heard together.

Mr. Leith, Q. C., and Mr. C. W. Arathoon, for the appellants in both appeals, contended that there was sufficient necessity for the sale, since at that time the family dwelling-house had been

seized. As for the original imprudence in incurring the debt, the appellants had nothing to do with that, they having ascertained the existence of a real pressure on the part of the judgment-creditor—*Gobind Monsee Dossee v. Sham Loll Bysack* (1). Besides, the money was applied to redeem the family-house and to repay money which had been expended in the purchase of land. If such a transaction is invalid under mithila law, it would follow that the power of alienating land can hardly ever exist under that system; they referred to *Vivada Chintamani* (ed. 1863), pp. 224 and 229; the *Mitakshara*, c. i, s. 1, vv. 22 and 27; and *Hunoomanpersaud Panday v. Mussamut Babooes Munraj Koonweree* (2).

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The father may sometimes alienate his own share without the consent of the son, and in Madras his individual share may be siezed in execution. The son's right is only inchoate till his father's civil or natural death. The father cannot bind more than his own share except under circumstances which entitle him to act as manager of the family. They referred to 1 Strange's Hindu Law, 2nd ed., pp. 19, 176, 177 and 184, and to *Mussamut Junnuk Kishoree Koonwur v. Rughoonundun Sing* (3).

A *bona fide* purchaser is not bound to show an absolute necessity for the sale—*Bisambhur Naik v. Sudasheeb Mohapattur* (4). *Jugdel Narain Suhaye v. Lalla Ram Prokash* (5), and *Mussamut Bhoosun Koer v. Sahebzaadee* (6).

The respondent did not appear.

The judgment of their LORDSHIPS was delivered by

Sir B. PEACOCK.—This is a suit brought by Baboo Kantoo Lall, the son of Bhikaree Lall, and by Mussamut Doolaroo Koonwaree on behalf of Mahabeer Persad, the minor son of Lala Bajrung Sahye, the said Kantoo Lall and Mahabeer Persad being grandsons of Moonsee Kunhya Lall, deceased, against a number of different defendants, who are wholly unconnected with each other, to recover possession from them of certain

(1) W. R., Jan. to July, 1864, 153.

(2) 6 Moore's I. A., 393.

(3) S. D. A. Rep. (1861), 213, see p. 220.

(4) 1 W. R., 96.

(5) 2 W. R., 292.

(6) 6 W. R., 149.

1874 portions of land which belonged to the ancestral estate. The first appeal arises out of the suit so far as it related to the first set of defendants, Baboo Girdharee Lall and Runjeet Panday, to recover possession of Talooka Nawalgawan and Akha Amanat Sarkar in Pergunna Chayen, and to set aside a deed of sale which was executed by the fathers of the two plaintiffs, dated the 28th July 1856. The fathers are both made defendants in the suit; and it is stated by one of the witnesses, and is probably the fact, that Bhikaree Lall, the father of Kantoo Lall, is in reality the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers, and to recover possession of the whole property,—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit. The High Court set aside that decision, and awarded to the plaintiff, Kantoo Lall, one-half of his father's share,—that is, one-half of an 8-anna share; but as to the other plaintiff, Mahabeer Persad, the minor son of Bujrung Sahye, they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision, no appeal has been preferred.

The property is situated in the Mithila district, and is governed by the Mithila law, which is very similar to the law administered under the Mitakshara. With reference to the Mitakshara upon this point, it may be well to read a portion of the judgment which was delivered by Lord Westbury in the case of *Appovier v. Rama Subba Aiyar* (1) before the Judicial Committee. He says:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family,

(1) 11 Moore's L. A., 75. at p. 89.

to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

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It is probable that on account of this case, and on account of a decision in the High Court—*Sadabart Prasad Sahu v. Foolbash Koer* (1), this suit was brought by Kantoo Lall and Mahabeer Persad, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father—*Rajaram Tewari v. Luchman Prasad* (2). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the plaintiff was not entitled to recover any portion of the estate as regards the first two defendants.

It appears that the deed of sale was executed on the 28th July 1856. At that time a decree had been obtained against Bhikaree Lall at the suit of Byjnath Chuckerbutty, upon a bond executed by Bhikaree in his favor, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was, therefore, necessary, to raise money to pay the debt of Bhikaree Lall, the father, and to get rid of the execution whatever the effect of it might be.

The property descended from Kunhya Lall, who died in the

(1) 3 B. L. R., F. B., 31.

(2) 4 B. L. R., A. C., 118.

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year 1842. The eldest of the two plaintiffs, Kantoo Lall was not born until 1844. So that, upon the death of Kunhya Lall, the property descended to Bhikaree Lall and Bujrung Sahye as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that, if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1844, before the deed of sale was executed, Kantoo Lall was born, and, by reason of his birth under the Mithila law, he had acquired an interest in this property.

Now it is important to consider what was the interest which Kantoo Lall acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died, and had left him as his heir, and the property had come into his hands, could he have said that, because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of *Hunoomanpersaud Panday v. Mussamut Babooes Munraj Koonveree* (1), Lord Justice Knight Bruce, who delivered the judgment of the Privy Council, says at page 421 :—"Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, as indeed the case of *Omed Ras v. Heera Lall* (2) above cited incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and

(1) 6 Moore's I. A., 393.

(2) 6 S. D. A. N. W. P., 218.

it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts.

The rule is, as stated by Lord Justice Knight Bruce :—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose the son might not be under any pious obligation to pay it ; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose ; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a Court of Justice ; there was nothing to show that it was given for an immoral purpose ; and the holder recovered a decree upon it. There is no suggestion either that the bond, or the decree was obtained *benami* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved, that the purchase-money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue ; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonà fide* purchaser who gave value for the estate, and to recover possession of it with mesne profits. This he is endeavouring to do after the pur-

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chaser has been in possession for a period of ten years ; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even, if there was no necessity to raise the whole purchase-money the sale would not be wholly void.

It appears, therefore, to their Lordships that the plaintiff is not entitled to set aside the deed of sale ; that the judgment of the Principle Sudder Ameen with regard to it was correct, and that the High Court were mistaken in upsetting that decision, and awarding to the plaintiff one-fourth of the estate, as being one-half of the share of his father.

In addition to the case in the Privy Council, there is a case in the Sudder Court of *Mussamut Junnuk Kishoree Koonwur v. Rughoonundun Singh* (1), in which it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose. The passage is at page 222, It is there said :—"The sales for the reversal of which the present suit is brought divide themselves into three classes : first, sales made by order of Court in execution of decrees ; second, sales made privately to satisfy decrees and bonds ; and third, sales made simply in order to raise money for some purpose or another. Freedom on the part of the son as far as regards ancestral property from the obligation to discharge the father's debts under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the plaintiff has been unable to show that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these), immoral, and such as under Hindu law the son would not be liable for."

It appears therefore to their Lordships that the plaintiff certainly is not entitled to set aside this deed ; and if he were so entitled, it is very doubtful whether he has any particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide

anything with regard to that point, inasmuch as they hold that the plaintiff is not entitled to set aside the deed of sale.

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The second appeal is by Muddun Mohun Thakoor. He is the fourth defendant in the suit which was brought against him to recover possession of a 5-anna share in Mauzas Rajpore and Alinuggur, &c. It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the

two fathers. He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favor of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case of *Hunoomanpersad Panday v. Musamut Babooee Munraj Koonweree* (1), which has already been referred to, in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate. At page 423 of the report, Lord Justice Knight Bruce says:—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it.

(1) 6 Moore's I A., 393,

1874 It has already been shown that, if the decree was a proper one,
 GIRDHAKAR the interest of the sons, as well as the interest of the fathers,
 LALL in the property, although it was ancestral, were liable for the
 v. payment of the father's debts. The purchaser under that
 KANTOO LALL. execution, it appears to their Lordships, was not bound to go
 MUDDUN further back than to see that there was a decree against those
 THAKOOR two gentlemen ; that the property was property liable to satisfy
 v. the decree, if the decree had been given properly against them ;
 KANTOO LALL. and having inquired into that, and having *bonâ fide* purchased
 the estate under the execution, and *bonâ fide* paid a valuable
 consideration for the property, the plaintiffs are not entitled to
 come in, and to set aside all that has been done under the decree
 and execution, and recover back the estate from the defendant.
 It appears to their Lordships, therefore, that the decision of the
 Principal Sudder Ameen as regards this [portion of the case was
 also correct.

Under these circumstances their Lordships will humbly
 recommend Her Majesty that the judgment of the High Court,
 so far as it relates to the two portions of the estates purchased
 by the appellants in these two appeals, respectively, be reversed,
 and that the decision of the Principal Sudder Ameen with
 regard to them be affirmed, and that the respondents do pay to
 the appellants, respectively, their costs in the High Court and
 their costs of these appeals.

Appeals allowed.

Agent for the appellants in both cases : Mr. T. L. Wilson.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

PARBUTTY BEWAH v. WOOMATABA DABEE.

*Landlord and Tenant—Tiled Huts—Right of Tenant to remove—Custom of Calcutta—Acquiescence.*1874
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Jany: 4.

On a case stating that the plaintiff became tenant to the defendant of certain land in Calcutta, and at the time of becoming such tenant purchased, from the out-going tenant, with the defendant's knowledge, two tiled huts, which were then standing on the land; that "it had been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff, erected upon the land let to such tenants, and such huts were by such practice treated as the property of the tenants, who, by such practice, were in the habit of disposing of them without the consent of their landlords;" that relying on the above-mentioned practice, the plaintiff, with the defendant's knowledge, had partially pulled down and rebuilt such huts; that the plaintiff's tenancy was determined, and the plaintiff ejected from the land, by the defendant; that before leaving she endeavoured to pull down and remove the huts, but that she was prevented from so doing by the defendant, who claimed the huts as her property:—

Held, that the plaintiff, by the practice stated, was entitled before giving up possession of the land, to pull down and remove the tiled huts.

Held further, that apart from the existence of a valid custom entitling the tenant to remove tiled huts, the plaintiff having bought the huts from the out-going tenant with the defendant's knowledge, and relying on the practice, and with the defendant's knowledge having partially pulled down and rebuilt the huts, was entitled as against the defendant to remove them.

CASE stated by agreement of the parties for the opinion of the High Court.

"1. The plaintiff, about seven years ago, became tenant to the defendant of a piece of ground containing about 3 cottahs and 4 chittaks, being a portion of the premises described in the plaint as No. 9, Durmahatta Street, in the town of Calcutta, at a monthly rent of Rs. 12-3; afterwards increased to Rs. 16. The hiring was a verbal one.

"2. At the time the plaintiff became tenant to the defendant, she purchased from the former tenant, Sumbhoochunder Dutt,

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with the knowledge of the defendant, a two-storied tiled hut and a one-storied tiled hut, then standing upon the said land, and which had been built thereon by the said Sumbhoochunder Dutt.

" 3. The plaintiff, relying on the practice hereinafter referred to, and with the knowledge of the defendant, partially pulled down and rebuilt the said huts with new materials. The said two-storied hut, when so reconstructed, consisted of, and now consists of, twelve rooms, and the one-storied hut of nine rooms, both being supported on posts or poles let into the ground, with mud walls and tiled roofs, and they are of the same class as the erections ordinarily known in Calcutta as tiled huts.

" 4. It has been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff, erected upon land let to such tenants, and such huts were by such practice treated as the property of the tenants, who, by such practice, were in the habit of disposing of them without the consent of their landlords, and such huts were seized and sold as goods and chattels of the tenants under writs of execution against their goods and chattels issuing out of the Calcutta Court of Small Causes previous to 1860, when, according to a statement contained in Temple's Practice of the Small Cause Court (1), published in that year, it did not prevail; but such seizures were subsequently made, and continued to be made down to the time of the decision of this Honorable Court, made on the 29th day of April 1873, on a reference from the Calcutta Court of Small Causes, in the suit of *Kallypersaud Singh v. Hoolas Chund* (2), by which it was decided that tiled huts could not be sold as the goods and chattels of the tenant under writs of execution from the Small Cause Court.

" 5. On the 11th day of February 1874, the defendant caused a notice to quit to be served on the plaintiff, of which the following is a copy:—

To PARBUTTY BEWAH.—Madam,—I, as agent of Sreemutty Woomatara Dabee, your landlady, on her behalf and under instruction from her, hereby give you notice to quit and deliver up to her possession of the piece or parcel of land, with the

(1) See p116.

(2) 10 B. L. R., 448.

tilled house on it, situate, lying, or being at No. 9, Durmahattah Street, in the town of Calcutta, which you hold from her as tenant thereof, on the expiry of the 29th day of Falgoun, 1280 B.S.—(Sd.) Moneymohun Sircar, Pleader.—Dated 11th February 1874, corresponding with 30th Mangh 1280.

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"6. The tenancy of the plaintiff having been thus terminated, she was ejected by the defendant from the said piece of land and huts on the 5th day of June 1874, by virtue of an order obtained from the Calcutta Court of Small Causes, under the provisions of s. 93 of Act IX of 1850. Before the plaintiff removed from the said piece of land, she endeavoured to pull down and remove the said tiled huts, but was prevented from so doing by the defendant, who claimed the said huts as her property, considering that this Honorable Court had decided in the suit of *Kallypersaud Singh v. Hoolas Chund* (1), that tenants had no right to remove tiled huts.

"7. The plaintiff paid the rent of the said land up to the end of the month of Mangh 1280, and tendered rent at the rate of Rs. 16 a month for the following months of Falgoun, Cheyt, and Bysakh. The defendant refused to receive the same, her reason being that she was entitled to receive a further sum of Rs. 2 per month for the said three last mentioned months, for taxes payable by the plaintiff, but paid by the defendant, and which she was entitled to receive as rent under ss. 15 and 16 of Act IX of 1867 of the Bengal Council.

"The following question of law arising upon the facts hereinbefore stated is submitted for the decision of this Honorable Court :—

"Whether the plaintiff, under the circumstances mentioned in the foregoing case, was entitled, before giving up possession of the land in the plaint mentioned, to pull down and remove the tiled huts erected thereon?"

It was further agreed between the parties that, in the event of the above question being answered in the affirmative, the plaintiff should be entitled to remove the huts, or to be paid by the defendant a sum of Rs. 475, the amount settled as the value thereof, and also to be paid her costs of the suit on scale No. 2 ;

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but that if the question was answered in the negative, the suit should be dismissed with costs on the same scale.

The instrument by which the out-going tenant, Sumbhoochunder Dutt, purported to sell the huts in question to the plaintiff was annexed to and formed part of the case stated; from that instrument it appeared that Sumbhoochunder treated the huts as his own property.

Mr. Phillips for the plaintiff.—The defendant, having determined the plaintiff's tenancy, has no lien on these huts for use and occupation; she can only sue for mesne profits. The custom of Calcutta is fully and fairly set forth in the case stated. The ownership in the soil does not in this country necessarily carry with it the property in the buildings erected thereon—*Shibdas Bandapadhyaya v. Bamandas Mukhapadhyaya* (1) and *In re Thakoor Chunder Paramanick* (2). In *Thakooranes Dosses v. Bisheshur Mookerjee* (3), Seton Karr, J., observes that the ryots' houses do not belong to and are never claimed by the landlord, but are invariably removed by the ryot when he changes his residence to some other village; see also Sir G. Campbell's Cobden Club Essay, pp. 164 and 211, and p. 9 of an essay entitled "Rustic Bengal," which originally appeared in the Calcutta Review for October 1874, signed with the initials J. B. P.

Moreover, the defendant, by her conduct, has precluded herself from questioning the plaintiff's right to remove these huts—*Durgaprasad Misser v. Brindaban Sookul* (4). The defendant relies on the cases of *Nattu Miah v. Nand Rani* (5) and *Kallypersaud Singh v. Hoolas Chund* (6), but those cases merely decide that tiled huts are not goods and chattels or moveable property within the meaning of the Small Cause Court Acts. The English law of fixtures does not apply; but even if it does these huts would come under that class of fixtures which the tenant may remove.

Mr. Collis for the defendant.—Had the land, upon which

(1) 8 B. L. R., 237.

(2) B. L. R., Sup. Vol., 595.

(3) *Id.*, 202, at p. 282.

(4) 7 B. L. R., 159.

(5) 8 B. L. R., 508.

(6) 10 B. L. R., 448.

these huts were erected, been situate in the mofussil, it is admitted that the defendant would be bound by the Full Bench decision in *In re Thakoor Chunder Paramanick (1)*. Since, however, the land is in Calcutta, there can be no doubt but that the English law applies; that it does apply is shown by the fact of the passing of Act XI of 1855, which limits the liability for mesne profits in cases under the English law. These huts are not goods and chattels or moveable property within the meaning of the Small Cause Court Acts—*Nattu Miah v. Nand Rani (2)* and *Kallypersaud Singh v. Hoelas Chund (3)*, and, therefore, being affixed to the soil, they will pass to the landlord; see Woodfall's *Landlord and Tenant*, 10th ed., p. 514 *et seq.* *Doyalchund Laha v. Bhoyrubnath Khettry (4)* *GopaulMullick v. Anundo Chunder Chatterjee (5)* go far to negative the existence of

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(1) B. L. R., Sup. Vol., 595.

(2) 8 B. L. R., 508.

(3) 10 B. L. R., 448.

(4) Cor., 117.

(5) Before Mr. Justice Norman,
Officiating Chief Justice, and Mr.
Justice Lock.

The 13th April 1871.

GOPAULMULLICK AND OTHERS (PLAINTIFFS) v. ANUNDO CHUNDER CHATTERJEE (DEFENDANT). *

Landlord and Tenant—Building, Right of Tenant to remove—Additions to existing Building.

A tenant, making additions to an existing building, is not entitled to remove the building, but is only entitled to compensation for the present value of the expenses incurred by him in making such additions. Possibly, in some cases, he may remove the additions if he can do so without in any way injuring the original building.

THIS was a suit to recover khas possession of two plots of land, and to establish the plaintiffs' right to possession of a third plot. The plaintiffs alleged that they had purchased the

land in dispute in 1856 at a sale by the sheriff in execution of a decree against two persons, named Dya Chund Bose and Kalikishen Pal; that they subsequently by oral agreement let the land to one Nobin Chunder Chatterjee, it being stipulated that he should give up the land on receiving fifteen days' notice; that Nobin refused to relinquish the land when called upon, and that a suit brought by them in the Revenue Court to evict him was, upon the intervention of the present defendant, dismissed. The plaintiffs thereupon took possession of the third plot, and then brought the present suit.

The defendant alleged that Nobin Chunder Chatterjee had obtained a maurasi lease of the three plots from Kalikishen Pallong before 1856, and that the defendant had purchased Nobin's rights at an auction-sale.

Among other questions raised was one with respect to the right to certain buildings standing on the land. It appeared from the sheriff's bill of sale

* Special Appeal, No. 1891 of 1870, against a decree of the Judge of Zilla 24-Pergunnas, dated the 14th June 1870, modifying a decree of the Subordinate Judge of that district, dated the 13th December 1869.

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any such right as is claimed by the plaintiff. Further, the plaintiff does not profess to rest her claim on the general principles of the Hindu law, but upon an implied contract founded on what she calls the "practice" in Calcutta for tenants to

to the plaintiffs, and from a deed subsequently executed between the plaintiffs and Kalikishen, that at the time of the plaintiffs' purchase a lower-roomed godown was standing on the land. The plaintiffs alleged but failed to prove, that during the time of Nobin's occupancy, they had made additions to this godown, and the Subordinate Judge accordingly held that it must be presumed that Nobin had made such additions. He was, however, of opinion that the maurasi potta set up by the defendant was forged, and that Nobin never had a right of occupancy in the land, and therefore had no right to remove the building; and he gave the plaintiffs a decree.

On appeal by the defendant, the Judge modified this decree so far as it determined that the buildings could not be removed. On this point, he observed:—"It has been found, and it has not been shown to me that the finding is incorrect, that the buildings on the land were erected by Nobin Chunder, and it appears therefore, that the defendant, who represents Nobin Chunder, is entitled to remove the buildings on the determination of the tenancy."

From this decision the plaintiffs appealed to the High Court.

Mr. Rochfort and Baboo Srinath Banerjee for the appellants.

Baboo Kali Prasanno Dutt for the respondent.

The judgment of the Court was delivered by

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ment proceeds on a mistake. He says:—"It has been found, and it has not been shown to me that the finding is incorrect, that the buildings on the land were erected by Nobin Chunder, and it appears, therefore, that the defendant who represents Nobin Chunder is entitled to remove the buildings on the determination of the tenancy."

Now on referring to the bill of sale, and the deed between Kalikishen and the plaintiffs executed subsequently, it appears that at the time of the plaintiffs' purchase there was a lower-roomed godown on the land. The Subordinate Judge finds that when Nobin entered into possession of the land and godown which was there at the time when he entered into possession. It appears that Nobin gave no evidence that he had made even the additions to the premises himself. The Subordinate Judge comes to the conclusion which may or may not be correct on the evidence that the additions were made by Nobin Chunder.

Be that as it may, the making of additions to an existing building will not entitle the person to remove the building; he will at most only be entitled to compensation for present value of, or the expenses incurred by him in making such additions; or, possibly in some cases, he may remove the additions if he can do so without in any way injuring the original building.

The case must go back to the Judge for trial.

remove such huts as these ; she does not venture to allege that there is an invariable custom entitling tenants to remove huts. But even if the Hiadu law be applicable, the tenant by that law has the right to remove these huts ; see Colebrooke's Dig., Bk. ii, vv. 99 & 100.

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Mr. *Phillips* in reply.

Our. adv. vult.

MACPHERSON, J.—I think that the question which is left for the decision of the Court must be answered in the affirmative.

The case states (para. 4) that it has been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff, erected upon the land let to such tenants, and such huts were, by such practice, treated as the property of the tenants, who by such practice were in the habit of disposing of them without the consent of their landlords. And it further (para. 6) states that before the plaintiff removed from the said piece of land, she endeavoured to pull down and remove the said tiled huts ; but was prevented from so doing by the defendant, who claimed the said huts as her property, considering that this Court had decided in the suit of *Kallypersaud Singh v. Hoolas Ohund* (1) that tenants had no right to remove the tiled huts.

It thus appears that this litigation has arisen solely in consequence of the decision in *Kallypersaud Singh's* case. But the defendant has wholly misunderstood that decision and its effect. The only point decided there was that tiled huts are not goods and chattles within the meaning of s. 58 of the Calcutta Small Cause Court Act (IX of 1850). The Court decided that tiled huts are not moveables, but it did not decide, nor did it approach the question, whether they are removeable. In the case of *Raj Chunder Boss* (2), Sir Barnes Peacock held that tiled huts in the mofussil are not moveable property within the meaning of s. 19 of the Small Cause Court Act (XI of 1865), but he expressly called attention to the fact that, although not moveable property within the meaning of that Act, a hut may possibly be removeable. He says "the word *moveable* in that section (19) is used in contradistinction to the word *immoveable* in s. 20.

(1) 10 B. L. R., 448.

(2) 8 B. L. R., 510, note.

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The word used is *moveable*, not *removeable*, and that word does not, in our opinion, comprehend everything which the judgment-debtor has a right to remove. It means property which is capable of being moved in its existing state." And in the judgment of Chief Justice Sir Richard Couch in the case of *Nattu Miah v. Nand Rani* (1), the distinction between moveable and removeable is recognized in the same manner.

None of the decided cases in fact affect the question, and the practice being such as is described in the case, the tenant clearly has a right to remove the huts. The origin of the practice or custom is doubtless to be found in the Hindu and Mahomedan laws, under both of which such huts would certainly have been removeable; see the judgment of Peacock, C.J., *In re Thakoor Chunder Paramanick* (2). It was argued for the defendant that there is no evidence or admission by the defendant of any custom such as the plaintiff relies upon. But the whole object of the parties in stating this case was to avoid going to further expense in taking evidence, and the like; and among the facts stated, there is no indication of any time at which the practice admitted did not exist. Besides this, it seems to me that there is an admission of a custom quite sufficient to support the plaintiff's claim, especially as the practice admitted, and as to the existence of which there can be really no doubt, arises merely from the leaving undisturbed what may be called the old native law on the subject.

The case of *Doyalchund Laha* (3), to which Mr. Collis referred, is not in point; for the erections in question there are not said to have been of the class known as tiled huts.

The facts stated, moreover, are such as, I think, would entitle the plaintiff to remove these huts even if no such general right as is claimed for tenants existed. At the time she became tenant, the plaintiff, with the knowledge of the defendant, bought the huts on the land from the out-going tenant, and the instrument of sale which was then executed forms part of the case. That document shows on the face of it, that the out-going tenant treated the huts as his own property, and the

(1) 8 B. L. R., 508.

(2) B. L. R., Sup. Vol., 595.

(3) Cor., 117.

defendant's rights as landlord as being limited to the land only. The plaintiff having so purchased the huts with the defendant's knowledge, relying upon the practice, &c., and with the knowledge of the defendant, partially pulled down and rebuilt the said huts, &c. (see para. 3), it seems to me that, apart from the question of there being a valid custom by which tenants are entitled to remove tiled huts, the plaintiff had a right to remove these particular huts as against the defendant, when the defendant, being aware of the circumstance under which the plaintiff purchased originally from the out-going tenant, and knowing also that the plaintiff relied on the existence of the alleged practice, stood by and allowed her to erect the new huts, which are the subject of the present discussion.

The question stated is decided in the affirmative, and I declare that the plaintiff is entitled to remove the huts, or to be paid Rs. 475 by the defendant, and that she is also entitled to be paid the costs of this suit on scale No. 2. As it is not desired that the huts should be actually removed now, the decree will be for Rs. 475, in lieu of removal.

Judgment for plaintiff.

Attorney for the plaintiff : Mr. Hart.

Attorney for the defendant : Mr. Canruthers.

PRIVY COUNCIL.

THE MADRAS RAILWAY COMPANY (Plaintiffs) v. THE ZEMINDAR OF CARVETINAGARAM (Defendant).

[On appeal from the High Court of Judicature at Madras.]

Duty of Zemindar—Ancient Tanks—Negligence—Statutory Powers—Liability for Damage occasioned by overflow of Tanks.

The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved upon zemindars. Such zemindars have no power to do away with these tanks, in the maintenance

* Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR R. P. COLLIER,
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of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such zemindars with regard to their tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed.

Such a zemindar, if the banks of any tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby.

Withers v. The North Kent Railway Co. (1) approved. *Rylends v. Fletcher* (2) distinguished.

APPEAL from a judgment of the High Court at Madras (Holloway, C.J., offg., and Innes, J.), dated the 15th February 1871, affirming a decision of the Judge of Chittoor, dated the 20th September 1870.

The suit was brought by the Madras Railway Company to recover from the defendant, the zemindar of Carvetinagaram, the sum of Rs. 45,000 as the aggregate amount of damage alleged to have been sustained by the plaintiffs by reason of injuries done in the years 1865 and 1866 to a portion of their railway and to certain portions of the works connected therewith, viz., to portions of the embankment and to small bridges and to several culverts constructed and necessary to allow the flow or escape of water, when accumulated in large quantities, through the railway embankments; and these damages included the alleged amount of traffic lost by the break of the line in consequence of the bursting and consequent escape of the water of two ancient tanks situate in the defendant's zemindari.

The plaint did not contain any charge of negligence on the part of the defendant, nor any charge that the injuries were caused by his wrongful act.

The defendant contended, *inter alia*, that if the injuries complained of did take place, they were not the result of any influences subject to his control, but rather the consequences of *vis major*, or the act of God; that the tanks referred to in the plaint had existed from time immemorial, and were absolutely necessary for the cultivation and enjoyment of the land, which could not be otherwise irrigated; and that the practice of

(1) 27 L. J., Ex., 417.

(2) L. R., 3 H. L., 330.

storing water in such tanks in India, and particularly in the district in question, and in the zemindari of Carvetinagaram and the adjacent districts, was lawful, and was sanctioned by usage and custom.

On the 21st January 1869, the Civil Court dismissed the suit with costs, holding that in the absence of a charge of negligence or default there was no cause of action alleged.

This decree was, on the 18th January 1870, reversed by the High Court of Madras, which directed the Civil Court to investigate the case on its merits. On the 20th September 1870, the Civil Court dismissed the suit. The Judge said—"I find that the defendant was bound only to use all reasonable care and precaution to prevent the occurrence of ordinary accidents arising from the bursting of the tanks; that he did use such reasonable care and precaution with respect to the tanks referred to in the plaint; that the bursting of the tanks in December 1865 was an extraordinary accident against which defendant was not bound to provide, and that he is not liable to plaintiffs for the damage sustained by them in consequence of the bursting of the said tanks."

This decree was, on the 15th February 1871, confirmed by the High Court (1).

The plaintiffs appealed to Her Majesty in Council.

Sir J. Karslake, Q.C., Mr. Watkins Williams, Q.C., and Mr. Mansel Jones, for the appellants, referred to *Rylands v. Fletcher* (2), which they contended laid down the correct principle of law applicable to cases like the present; see especially the judgments of Lord Cairns and Lord Cranworth in that case; see also *Filliter v. Phippard* (3), *Tubervil v. Stamp* (4), *Jones v. The Festiniog Railway Co.* (5), *Vaughan v. The Taff Vale Railway Co.* (6), and *Ruck v. Williams* (7).

It is not a natural user of land to store up water in quantities

(1) 6 Mad. H. C. Rep., 180.

(2) L. R., 3 H. L., 330.

(3) 11 Q. B., 347.

(4) 1 Salk., 13.

(5) L. B., 3 Q. B., 733.

(6) 29 L. J., Ex., 247; S. C., 5 H. & N., 679.

(7) 27 L. J., Ex., 357; S. C., 3 H. & N., 308.

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so large as may escape and damage one's neighbours. A water tank should be constructed large enough to provide against all contingencies, as well ordinary as extraordinary, which are reasonably likely to occur. A downfall of rain in unusual or unexpected quantities is not such an improbable or impossible event as to come within the category of acts of God, for the injury done by which no one is responsible. The damage resulted directly from this artificial structure which the defendant placed on his land, and in erecting which he did not exercise due care and make due provision for ensuring immunity to his neighbours; see *Tipping v. The St. Helen's Smelting Co.* (1). It is impossible for the defendant to plead a prescriptive right to allow water to escape.

Mr. *Leith*, Q.C. and Mr. *Grady*, for the respondent, contended that the English law was not applicable to the special circumstances of the case; that decision in *Rylands v. Fletcher* (2) was not applicable; and, that if it were, the present case came within the exceptions there laid down. The act for which the defendant was held responsible in *Rylands v. Fletcher* (2) was a voluntary act. Here the tank was an integral part of the zemindars's property, which he received with the land, which he was under obligation to maintain, and which it would have been a crime to displace. The escape of water was the result of unavoidable circumstances, and the zemindar, being neither guilty of, nor charged with, negligence, could not be held responsible. They referred to *Mayor of Lyons v. The East India Co.* (3).

The judgment of their LORDSHIPS was delivered by

Sir R. P. COLLIER.—The Madras Railway Company claimed in this suit damages against the defendant, the zemindar of Carvetinagaram, for injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The defendant denied that the injuries complained of resulted from the bursting of the tanks; he asserted that if they did so arise, the bursting was caused by no act or negligence of his,

(1) L. R., 1 Ch., 66; S. C., in Dom. (2) L. R., 3 H. L., 330.
Proc., 11 H. L. Ca., 642. (3) 1 Moore's P. C., 175.

but by *vis major*, or the act of God. He further pleaded in these terms :—

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" 4. The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in India, and particularly in this district and in the zemindari of Carvetinagaram and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindari is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

" 7. The defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time."

He also contended that the damage arose through want of proper care on the part of the plaintiffs in the construction of their works, but this contention was abandoned. It was found by both Courts, and is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were—

1. Whether the injuries complained of were the result of *vis major*, or the act of God; or other influences beyond the defendant's control?

2. Whether defendant is, liable for any, and, if so, what damages sustained by the plaintiffs?

The evidence given in the cause may be summarized as follows:—It was shown that the tanks of the defendant, which were ancient tanks, the date of their origin not appearing were constructed in the usual manner; that the banks were properly attended to and kept in repair; that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient.

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and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years; but that an improved description of sluice, of recent introduction, would be still more efficacious; that at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the Deputy-Inspector of the railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the defendant as exceeding any fall of rain for twenty years; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off; that the banks of the tanks were overflowed, and finally carried away.

Upon these facts the acting Civil Judge of the Civil Court of Chittoor found for the defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent.

This judgment was affirmed by the High Court on appeal.

The appellant now contends that the judgment of the High Court should be reversed on two grounds—

1st.—That the defendant, by storing up water on his land, rendered himself liable in damages should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2nd.—That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support of the first contention is *Rylands v. Fletcher* (1), which it becomes necessary to examine. In that case the plaintiffs, the owners of a mine, sued for damages, the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works into the plaintiff's mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the plaintiffs were entitled to damages against the defendants. The grounds of this judgment are stated very

(1) L. R., 3 H. L., 320.

clearly and shortly by the then Lord Chancellor (Lord Cairns), and Lord Cranworth. The Lord Chancellor says:—"The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of enjoyment of the land, be used; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or under ground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants, in order to have prevented the operation of the laws of nature. . . . On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if, in the course of their doing it, the evil arose . . . of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then, for the consequence of that, in my opinion, the defendants would be liable."

Lord Cranworth thus states the principle of the decision:—"If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . .

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1874 and the doctrine is founded on good sense. For when one person in managing his own affairs, causes, however, innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*." **MADRAS RAILWAY CO. v. ZEMINDAR OF GARVETINA-GARAM.**

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by Statute.

This distinction was acted upon in *Vaughan v. The Taff Vale Railway Co.* (1), where it was held by the Exchequer Chamber that a railway company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by Statute. Cockburn, C.J., observes :—
 "When the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the party using it is not responsible." This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or companies, without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a waterworks company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity—*Blyth v. The Birmingham Waterworks Co.* (2).

On the other hand, in *Jones v. The Festiniog Railway Co.* (3), it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived.

It has been argued on the part of the respondent that the case

(1) 5 H. & N., 679.

(2) 25 L. J. Ex., 212.

(3) L. R., 3 Q. B., 733.

of *Rylands v. Fletcher* (1), decided on the relations subsisting between adjoining landowners in this country, has no application whatever to India. Though that case would not be binding as an authority upon a Court in India not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim *sic utere tuo ut alienum non ledas*, expressing a principle recognized by the laws of all civilized countries, it does not afford a rule applicable to circumstances of the same character in India,—they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mahomedan law, by Regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts, referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in *Rylands v. Fletcher* (1).

In that case the defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns “a non-natural use” of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons; and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been con-

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(1) L. R., 3 H. L., 330.

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ferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the Railway Company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances; see *Withers v. The North Kent Railway Co.* (1).

The second ground on which the appellant relied was not so clearly stated. Their Lordships understood it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the defendant.

It should be observed that the question of negligence was little, if at all, argued in the High Court.

The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron Alderson:—"Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do," in either case unintentionally causing mischief to a third party (2); and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Agent for the appellants: Messrs. *Freshfields*.

Agents for the respondent: Messrs. *Lawrie, Keen, and Rogers*.

(1) 27 L. J., Ex., 417.

(2) *Blyth v. The Birmingham Waterworks Co.* 25. L. J., Exch., 213.

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Birch.

THE COLLECTOR OF RAJSHAHYE ON BEHALF OF GOVERNMENT) ONE OF
THE DEFENDANTS) v. RANI SHAMASOONDREE DEBEA AND OTHERS
(PLAINTIFFS).*

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June 30 &
July 8.

*Accretion—Reformation on old Site—Island-chur—Rights of Government—
Regulation XI of 1825, s. 4, cl. 3—Act IX of 1847, s. 7.*

The Government is not entitled, under cl. 3, s. 4 of Regulation XI of 1825, to take possession of land which has reformed on an old site of land belonging to another, although the reformation forms an island, and is surrounded by a channel which is not fordable.

THIS suit was brought to recover possession of certain land let to the second defendant by the Government, who had taken possession of it under s. 7, 'Act IX of 1847, as being an island in a navigable river within cl. 3, s. 4, Regulation XI of 1825.

The plaintiffs were the owners of Dullubpore, which contained the main land of Daveenuggur, lying both on the northern and southern banks of the river Pudma. A considerable quantity of the plaintiff's land lying on the northern bank of the river had been washed away, but a portion of the land so washed away gradually reformed on its original site, and was taken possession of by the plaintiffs.

After this, an arm of the river commenced to flow from east to west cutting through the sandy low land of Daveenuggur lying to the north of the aforesaid reformed land. North of this stream, which was unfordable, a portion of the main land of Daveenuggur had been left in its original state. During the survey of the chur lands in 1867 and 1868, the lands held by the plaintiffs to the south of the aforesaid stream as reformed lands of Daveenuggur were entered on the thakbust map as an island chur belonging to Government; and the thakbust

*Regular Appeal, No. 155 of 1873, against a decree of the Subordinate Judge of Zilla Rajshahye, dated the 11th of March 1873.

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superintendent passed an order on the 29th October 1868, directing that possession should be taken on the part of Government. On the 17th July 1869, the said land was let out in ijara to Praunkisto Sircar, the second defendant, who 'dispos-
sessed' the plaintiffs. The plaintiffs accordingly prayed for recovery of possession of the aforesaid land alleged to be an island chur, as well as of 3,500 bigas of land which appeared on all sides of that chur.

The defence was that the land was land to which the Govern-
ment was entitled under Regulation XI of 1825.

The Lower Court gave the plaintiff a decree ; from which the Collector appealed to the High Court.

The *Senior Government Pleader* (Baboo *Ananda Persad Banerjee*) for the appellant.

Baboos *Srinath Dass* and *Mohini Mohan Roy* for the respondents.

The *Senior Government Pleader* contended that, under Regulation XI of 1825, s. 4, cl. 3, Government was entitled to the island chur. There is a marked difference between cls. 3 and 4. This Regulation declared explicitly the law upon the matter, and so it remained until Act IX of 1847. S. 9 of that Act declares that no suit will lie against Govern-
ment except as regards the proprietary rights to islands. S. 7 provides that when, on inspection of maps, it appears that an island has been thrown up in a large navigable river liable to be taken possession of by Government under cl. 3, s. 4, Regulation XI of 1825, the Local Revenue Authorities shall take possession of it. S. 3 of Bengal Act IV of 1868 is substituted for s. 7 of Act IX of 1847, and does away with the necessity of inspection of maps. By the Regulation and Acts, the Local Revenue Authorities are empowered when an island appears to take possession of it on behalf of Government, they are not directed to inquire whether the island is a reformation on an old site or not. Lands which, upon an inspection of the survey map, have been added to an estate, although they may be a reformation upon an old site, are liable to assessment

under s. 6, Act IX of 1847—*Dewan Ramjewan Singh v. Collector of Shahabad* (1).

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All the cases, hitherto, with one exception, have been on

(1) *Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie*

ing, remained as before in your petitioner's possession."

The 16th May 1872.

DEWAN RAMJEWAN SINGH AND OTHERS (PLAINTIFFS) v. THE COLLECTOR OF SHAHABAD (DEFENDANT).*

Accretion—Reformation on old Site—Assessment of addition to estate paying Revenue directly to Government—Jurisdiction of Civil Court—Immunity of Officer acting in good Faith—Act IX of 1847, ss. 6 & 9.

No suit will lie in a Civil Court to recover possession of lands which have been added to an estate paying revenue direct to Government by the revenue authorities after an inspection of maps under s. 6 of Act IX of 1847; although such lands have reformed on an old site of land belonging to another.

Baboo Mohesh Chunder Chowdhry and Baboo Chunder Mitter for the appellants

Baboo Annoda Persad Banerjee for the respondent.

THE judgment of the Court was delivered by

COUCH, C.J.—The case which is stated in the plaint, and which must for the purpose of this appeal, be considered to be the true state of facts, is, that "from the time of the decennial settlement and the measurement of 1806 F.S., and for a long time subsequently, the land so settled remained in its pristine condition without the slightest change by diluvion or alluvion; only a short time previous to the survey of 1844, a small tract of land out of the aforesaid land was washed away and submerged by the river, but which subsequently reform-

Therefore, at the time of the passing of Act IX of 1847, a portion of the land was washed away or submerged, and the estate which was surveyed, and the surveying of which was approved by s. 4 of the Act, was the estate without that portion. If, instead of there being a reformation as is stated, there had been a further washing away or submerging of the land which appeared in the survey approved by the Act, the proprietor would have been entitled under s. 5 to have claimed a deduction from the jama of the estate. That section says—"Whenever on inspection of any such new map, it shall appear to the Local Revenue Authorities that land has been washed away from, or lost to any estate paying revenue directly to Government, they shall, without loss of time, make a deduction from the Sudder jama of the said estate equal to so much of the whole Sudder jama of the estate as bears to the whole, the same proportion as the Mofussil jama of the land lost bears to the Mofussil jama of the whole estate; but if the Mofussil jama of the whole estate, or of the land lost cannot be ascertained to the satisfaction of the Local Revenue Authorities, then the said Local Revenue Authorities shall make a deduction from the Sudder jama of the estate equal to so much of the whole Sudder jama of the estate as bears to the whole, the same proportion as the land lost bears to the whole estate."

That section having provided for a

*Regular Appeal, No. 230 of 1871, against a decree of the Subordinate Judge of Zilla Shahabad, dated the 12th July 1871.

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cl. 1, s. 4 of Regulation XI of 1825. The first case, *Mussamut Imam Bandhi v. Hergevind Ghose* (1), was a suit about disputed boundaries: *Lopez v. Maddan Thakoor* (2), was a case of submersion, and went upon the English case of *The King v. Lord Yarborough* (3). *Lopez's* case does not apply to an island, the judgment must be taken with reference to the

loss of a portion of the estate appearing upon the inspection of the new map, s. 6 provides that "when-ever on inspection of any such new map it shall appear to the Local Revenue Authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Sudder Board of Revenue, whose orders thereupon shall be final."

I think that we must read these two sections together, and that since, in this case, there has been an addition to the estate, appearing upon the inspection of the new map, although it is, as stated in the plaint, a reformation upon the old site, it comes within s. 6 and is land added to the estate.

The decision of the Privy Council (a) is a decision with regard to the property in the land which is so reformed, that is, where the land, which was formerly lost to the proprietor by being washed away or submerged, is reformed upon the old site and the boundaries can be traced; the land so reformed belongs to him. But that decision does not touch the construction of this Act, which seems to have been intended to provide in a simple way for the case where, upon the inspection of the new map, there appears either to have been a loss of land to the estate or an addition to

it as it appeared on the former survey.

It appears to me that this is a case coming within s. 6, where power is given to assess the land which had been reformed, and then the same section says expressly that the orders of the Sudder Board of Revenue shall be final in such a matter. If the present plaintiff had any case at all, it was one for the consideration of the Sudder Board of Revenue and not for a suit in a Civil Court.

Besides that, the 9th section says that no action shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act. The Collector here was exercising the powers conferred by the 6th section in determining that the land which appeared on inspection of the new map to be added to the estate was liable to assessment, and was undoubtedly acting in good faith. The case seems to come not only within s. 6, but, if it had been necessary to rely upon s. 9, it comes also within that, as a case where the powers of the Act were being exercised by an officer of Government in good faith.

I think, therefore, that the present suit will not lie, and, that the judgment of the Lower Court dismissing it ought to be confirmed. The appeal will be dismissed with costs.

(1) 4 Moore's L. A., 403.

(2) 5 B.L. R., 521.

(3) 2 Bligh, N. S., 147.

(a) *Lopez v. Madden Thakoor*, 5 B. L. R., 521.

matter which was then before the Court, namely the question whether land was an accretion or not. The same question was involved in *Pahalwan Singh v. Maharaja Muhessur Buksh Sing* (1); see also *Romanauth Thakoor v. Chundernarrain Chowdhry* (2). A detached chur does not always belong to the riparian proprietor—*Sree Hckowrie Sing v. Heeralall Seal* (3). The case of *Dewan Ramjewan Singh v. Collector of Shahabad* (4), shows that the principle of *Lopez's* case is not applicable to all cases of accretions and reformation, and it is submitted that the decision in *Mani Lall Sahu v. Collector of Surun* (5) in which it was assumed that it does apply to all such cases, is wrong. The Regulation is explicit and clear, and if it is considered that *Lopez v. Maddan Thakoor* (6), does govern such cases as the present, the Regulation will cease to have any force.

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Baboo Srinath Dass for the respondents.—The plaintiffs having all along paid the Government revenue, there was no abandonment of the portion which had been washed away, and therefore the case does not come within the exception mentioned in *Lopez v. Maddan Thakoor* (6), and it is submitted the principle of that case applies.

Regulation XI of 1825 does not apply to lands which have been formed on sites belonging to others: this is clear from the preamble; see also *Nogender Ohunder Ghose v. Mahomed Esaf* (7); therefore the present case does not come under cl. 3 of s. 4, Regulation XI of 1825, but under cl. 5. Act IX of 1847 makes no change in the law, but only in the rules of procedure; so also Bengal Act IV of 1868. The case of *Dewan Ramjewan Sing v. Collector of Shahabad* (4), decides that no suit will lie to establish proprietary rights under Act IX of 1847. No doubt, the Privy Council cases which have been cited, went upon cl. 1 of s. 4, but the principle of them

(1) 9 B. L. R., 150.

(2) March, 186.

(3) 12 Moore's f. A., 136.

(4) *Ante*. p. 221.

(5) 6 B. L. R., App., 93.

(6) 5 B. L. R., 521.

(7) 10 B. L. R., 406.

1874 applies to cases where the site remains in the original owner,
 no matter whether it is covered with water or not.
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 RANI SHAMA-Collector of Sarun (1), which it is submitted should govern it.
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Baboo Mohini Mohun Roy on the same side.

The Senior Government Pleader in reply :—

Cur. adv. vult.

The following Judgements were delivered:—

BIRCH, J.—It has been admitted before us by the Government Pleader that the lands in dispute are identical with the diluviated lands of Daveenuggur, and that they have formed on the old site of the village which belonged to the plaintiffs' estate. This being so, all that we have to consider in this appeal is, whether the fact of the land forming as an island gives the Government a title to it under cl. 3, s. 4, Regulation XI of 1825.

In this case we are fortunate in having a series of authentic maps prepared by the survey officers from which we are able, without difficulty, to trace the changes that have taken place in the course of the Ganges, within the last sixteen years in the tract wherein the land in dispute is situated. These maps conclusively show that the Ganges first encroached on the plaintiffs' land; that it divided itself for a time and threw out a new arm or *sota*; that the main channel again receded leaving the site of the diluviated portion of Daveenuggur washed on the one side by the main channel of the Ganges, and on the other side by the new arm or *sota*. As the river has receded, this arm has naturally been drying up. At the time when this arm was supposed to be not fordable, the Collector stepped in and resumed the land as an island chur, and we are now called on to determine whether the Government had any right, assuming that the *sota* was not fordable, to take possession of this land. In the case of *Nogender Chunder Ghose v. Mahomed Esqf* (2), their Lordships of the Privy Council thus observe:—
 “No express provision is made for the case of land which has

(1) 6 B. L. R., App. 93.

(2) 10 B. L. R., 406, see p. 429

been lost to the original proprietor by the encroachment of the sea or river. But on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case ; which must, therefore, be determined by the general principles of equity or justice under the 5th rule. That the right of the proprietor in the case last put exists and is recognized by law in India is established by at least two cases decided at this Board and therefore binding on their Lordships, viz., the case of *Mussumat Imam Bandhi v. Hergovind Ghose* (1), and the recent case of *Lopez v. Maddan Thakoor* (2), decided on the 11th July 1870."

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In *Lopez's* case it was remarked that no principles of equity would give the plaintiffs' property to the defendant. So in this case whoever was the owner of the land before the inundation and formation of the *sota*, remained the owner while the site was submerged and after it became dry ; all that has to be ascertained in a case of this description is to whom does the site belong. It is not denied that the site of plaintiffs' village Daveennggur and the land in dispute are identical. External marks there may be none, but the identity of the site is clearly established by the maps, and the objection urged in the lower Court by the Collector against the identity has been very properly withdrawn here. This being so, there can be no doubt that the lower Court has correctly applied the law in holding that the submergence of the site did not deprive the plaintiffs of their property. That site formed part of their permanently settled estate, and they continued to pay their full quotta of Government revenue, although the village was submerged. As soon as it re-appeared and was taken possession of by Government as an island, the plaintiffs took a lease from Government that the property might not pass into other hands. They have now succeeded in showing that the land belongs to them and not to Government. The appeal of the Government must be dismissed with costs.

KEMP, J.—I concur in the decision just delivered by my learned colleague. The Government took possession of the

(1) 4 Moore's I. A., 403.

(2) 5 B. L. R., 521.

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disputed lands under s. 7, Act IX of 1847 ; see the proceeding of the Superintendent of Dearah Surveys of the 29th of October 1868, pages 2 and 3, Appendix No. 1 of the printed book. Now s. 7, Act IX of 1847, refers to lands which are "liable to be taken possession of by Government under cl. 3, s. 4, Regulation XI of 1825," and I am clearly of opinion for the reasons given in the judgment just delivered by my learned colleague, in which I entirely concur, that the lands in dispute are not liable to be taken possession of by Government under s. 7, Act IX of 1847. The case of *Mani Lall Sahu v. Collector of Sarun* (1), also supports the view which we have taken. In that case Jackson, J., had before him the case of *Lopez v. Maddan Thakoor* (2), although he had not the later case decided by the Privy Council of *Nogender Chunder Ghose v. Mahomed Esuf* (3), at the time he passed that decision. The Pleader for Government admits that the case of *Mani Lall Sahu v. Collector of Sarun* (1), is against him, and he has not been able to show us any decision taking a contrary view. I would dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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July 15.

MOULVI MAHOMED SHUMSOOL HOODER AND OTHERS (DEFENDANTS) v. SHEWUKRAM, *alias* ROY DOORGA PERSHAD (PLAINTIFF).*

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Construction of Hindu Will—Alienation by Hindu Widow—Liability of Reversioner to repay Purchaser.

A Hindu, by a petition to the Collector of Patna, recited the deaths of his son, of his brother without leaving issue, his brother's wife, and his own wife, and then proceeded to dispose, as if by testament, of his property as follows. "Only *D K*, widow of my son, who, too, excepting her two daughters

*Present:—SIR J. W. COLVILLE, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR L. PEEL.

(1) 6 B. L. R., App., 93.

(2) 5 B. L. R., 521.

(3) 10 B. L. R., 406.

born of her womb, S and D, has no other heirs, is my heir. Except D K none other is, nor shall be, my heir and malik Furthermore, to the said D K, too these very two daughters named above, together with their children who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and malik."

D K survived the testator: S predeceased him without issue: D survived him and then died leaving S R, her only son and heir. D K, in 1854, after the testator's death, sold part of the lands mentioned in the petition to M for Rs. 41,000, of which Rs. 14,000 were devoted to pay off a mortgage thereon.

In a suit by S R against M and D K, to protect his future right and title to the property sold by cancelment of the deed of sale,—*held*, that the intention of the testator must be construed to have been that D K should not take an absolute estate, but that she should be succeeded therein by her two daughters (1). D K, therefore could not convey to M an estate beyond her own life, and S R was entitled to a decree declaring his right to the property on the death of D K, credit being given to M for the Rs. 14000 paid by him in respect of the mortgage, which otherwise S R would have had to redeem.

APPEAL from a decision of the High Court at Calcutta (Couch, C. J., and Mitter, J., Bayley J., dissenting), dated the 13th September 1870, varying a decree of the Judge of Patna, dated the 31st December 1869.

The plaintiff, who was the great grandson of one Roy Hurnarain, a Hindu, sued to set aside a sale by his grandmother Rani Dhun Kowur, who was the widow of Hurnarain's son Roy Kalika Pershad, and for a declaration of his right to Hurnarain's estate after Rani Dhun Kowur's death. Roy Kalika Pershad died before his father; and at the time of the petition of Hurnarain hereinafter mentioned, the only members of his family living were Rani Dhun Kowur and her two daughters Bibi Shitaboo and Bibi Dularee, both of whom were then apparently unmarried. On the 16th of August 1830, Hurnarain, who had a net income of about Rs. 80,000 per annua, filed a petition in the Court of the Collector of Patna, in which, after reciting that he was entitled to, and in possession of, certain ancestral property, moveable and immoveable, in the district of Behar, he stated that—

"As in the year 1229 Fuslee, Roy Kalika Pershad, my son, died and recently in the year 1237 Fuslee, Roy Gunga Pershad by younger

(1) See *Prosunno Coomar Ghose v. Tarrucknath Sirkar*, 10 B. L. R., 267.

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brother with his wife died without leaving issue, and my wife too died before, only Mussumat Rani Dhun Kowur, widow of Roy Kalika Pershad my deceased son above-mentioned, who, too, excepting her two daughters born of her womb, Mussumat Bibi Shitaboo and Bibi Dularee, has no other heirs, is my heir. Except Mussumat Rani Dhun Kowur aforesaid, none other is nor shall be my heir and malik; accordingly in the petition perused by the Court on the 16th of the month of April 1830, A. D., information about this I have before given to the Hazar (presence). As this borrowed life cannot be depended upon, therefore it is hoped by courtesy and condescension that the name of the petitioner being expunged from the column of the proprietorship and malguzari of the rent-paying villages, and villages and gardens rent-free, detailed below, in the district of Patna, that of Mussumat Rani Dhun Kowur-widow of Roy Kalika Pershad, my deceased son above-mentioned, be inserted in the place of my name as regards proprietorship and malguzari. Furthermore, to the said Mussumat Rani, too, these very two daughters named above, together with their children who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and malik. And the other is this: during my lifetime, as respects the management and carrying on of the affair of the villages and suits and the management of the domestic affair, my control over the same shall continue as it is by dastur (custom)."

On the 3rd of October 1830, by order of the Collector, Roy Hurnarain's name was expunged, and that of Rani Dhun Kowur substituted in the records of the Collectorate.

Bibi Shitaboo died subsequently, on the 1st of March 1835, and Roy Hurnarain died on the 1st of March 1838.

Bibi Dularee died the 19th of November 1847, leaving her husband, Roy Luchmun Pershad, and an infant son, named Shewukram, born the 10th May 1847.

On the 12th of September 1854, Rani Dhun Kowur, alleging that she wanted money to pay off debts and meet pressing necessities of herself and the family, executed a mukhtarnama, under which, on the 13th of November 1854, the lands mentioned therein, being the subject of the suit out of which this appeal arose and being comprised in the said petition of Roy Hurnarain, were sold to the defendant Mahomed Shumsool Hooder, for Rs. 41,000. The latter paid the purchase-money, devoting Rs. 14,000, part thereof, to the repayment of a mort-

gage subsisting upon the said lands, and took possession of the lands. Besides this mortgage debt the only debts shown to exist were one of Rs. 10,000 contracted by Hurnarain and others, amounting to Rs. 4,000 contracted after his death by Rani Dhun Kowur. Another debt of Rs. 22,000 had been paid off before the sale.

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On the 23rd of April 1868, Shewukram brought the present suit in the Zilla Court of Patna against Mahomed Shumsool Hooder and Rani Dhun Kowur, for an order declaratory of his future right and title to the said lands, and for cancellation of the deed of sale.

On the 1st of September 1868 the Judge dismissed the suit, but after remand by the High Court, he, on the 31st of December 1869, decreed that the plaintiff, after paying the consideration money (meaning the Rs. 41,000), should have possession of the lands after the decease of Rani Dhun Kowur.

On the 13th of September 1870 the High Court decreed that the plaintiff was entitled to have the sale of the 13th of November 1854 set aside, and his right and title to the lands declared, on payment of the sum of Rs. 14,00 only (1).

The defendants appealed to her Majesty in Council, and the plaintiff entered a cross-appeal against so much of the decree as directed the Rs. 14,000 to be paid by him.

Mr. Leith, Q. C., for the appellants, contended that, according to the true construction of the petition of the 16th of August 1830 (which had been treated as of the nature of a testamentary deposition), Rani Dhun Kowur had become on the death of Roy Hurnarain absolutely entitled to the lands in dispute, with full power of alienation. The respondent, as presumptive heir of his maternal grandmother, was bound by her acts. The deed of sale, having been executed to meet necessities, ought not to be cancelled as against a *bond fide* purchaser for value. If set aside, it ought to be on terms of restoring the purchase money to the vendors, as decreed by the Judge of Patna. On the construction of the deed he referred to *Chatter Lall Sing v. Shewukram* (2).

(1) 7 B. L. R., 700 note.

(2) 5 B. L. R., 123.

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Mr. *E. Harrison*. on the same side, referred to *Crockett v. Crockett* (1), and *Sabin v. Heape* (2). The Courts below adopted the converse rule of construction to that laid down in *Humberston v. Humberston* (3), and *Spalding v. Shalmer* (4).

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Mr. *Field* Q. C. and Mr. *Doynes* for the respondent, contended that according to the true construction of the petition, the daughters of Rani Dhun Kowur either took an absolute joint estate, or estates for life with remainder absolutely to the heir of the survivor; and that the appellant purchased only the rights of the Rani, and thereby acquired no title as against the respondent.—*Sreenuttu Rabutti Dossee v. Sibchunder Mullick* (5). Further there was no evidence of the sale having been made under necessity.

Mr. *Leith*, Q. C., in reply.

The judgment of their Lordships was delivered by.

SIR ROBERT COLLIER—In this case a Hindu widow lady, of the name of Rani Dhun Kowur, in the year 1854, sold an estate to the defendant by a conveyance in which she purported to give him an absolute title,—what we should call in this country an estate in fee simple. Her grandson, on coming of age, a great many years after, brings a suit for the purpose of having it declared in his favor that this lady had only the power to grant a life-estate, and that after her death he was entitled to an estate in remainder.

The question depends upon the construction of a petition presented by Roy Hurnarain to the Collector in the year 1830, which has been treated by both sides in this litigation, and by both Courts, as in the nature of a testamentary instrument. The state of the family of Roy Hurnarain at the time of his presenting this petition was this: There were living only the before-mentioned Rani Dhun Kowur, the widow of his son Roy Kalika Persad, and her two daughters by that son, Bibi Shitaboo and Bibi Dularee, who at that time (1830) appear

(1) 2 Ph., 553.

(4) 1 Vern., 301.

(2) 27 Beav., 553.

(5) 6 Moore's I. A., 1.

(3) 1 P. Wms., 332.

to have been unmarried. That being the state of the family, Hurnarain makes this, which must be now considered as a testamentary instrument. He first recites that the property of which he is about to dispose was ancestral property; he recites the death of his son Roy Kalika Pershad, and the death of his own wife, and he recites that the widow of his son, Rani Dhun Kowur, was alive, that she has no heirs except her two daughters, Mussumat Bibi Shitaboo and Bibi Dularee, her daughters by his son, who would be her heirs. He then uses expressions which, if they stood alone, would, in their Lordships' opinion, show that he intended to make an absolute gift to Rani Dhun Kowur. The expressions are these: "and my wife too died before, only Mussumat Rani Dhun Kowur, widow of Roy Kalika Pershad, my deceased son above-mentioned, who too, excepting her two daughters born of her womb, Mussumat Bibi Shitaboo and Bibi Dularee, has no other heirs, is my heir." And then he further goes on to say, "except Mussumat Rani Dhun Kowur aforesaid, none other is, nor shall be, my heir and malik." He proceeds, however, to again refer to the daughters of Rani Dhun Kowur, whom he had before mentioned; it can scarcely be assumed without some purpose, for he goes on to say, "Furthermore, to the said Mussumat Rani, too, these very two daughters named above, together with their children, who, after their marriage, may be given in blessing to them by God Almighty, are and shall be heir and malik." There is, indeed, another translation of this document, which has been referred to in another case, but inasmuch as this translation appears to have been agreed to by the parties, their lordships think they must adopt it.

It has been contended that these latter expressions qualify the generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that Mussumat Rani Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindu widow. In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions

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and wishes of Hindus with respect to the devolution of property.

It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate; whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial. It would appear that the testator uses the word "heir" as signifying the person who is to take immediately in succession to another; that he applies it to the Rani as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Rani; and their Lordships think that, viewing the will as a whole, when he uses the expression "except Mussumat Rani Dhua Kowur, aforesaid, none other is her shall be my heir and malik," it may be fairly construed as meaning that she shall take a life-interest immediately succeeding him, without that interest being shared by her daughters or by any other person.

On the whole, therefore, although undoubtedly there is some difficulty in construing this testamentary document, their Lordships are of opinion that the Indian Courts have been right in construing it as not giving an estate of inheritance to the Rani which she was able absolutely to alienate. If that be so, her daughters under this will take after her, and the question has been raised whether they take as joint tenants or tenants in common. The High Court appear to suppose that they would take as joint tenants, but inasmuch as one of these daughters died before the testator, this question becomes immaterial,

because in either case the plaintiff would be the heir and would be entitled to institute this action.

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It follows that the Rani could not convey to the defendant, who must be taken to have been a *bonâ fide* purchaser, having paid the full value (although he does not appear to have made any inquiries as to whether or not the Rani did possess a power, unusual in Hindu ladies, of making a conveyance of an estate in fee simple), an estate beyond her own life, and that the plaintiff is entitled to a decree to the effect that after her death the property belongs to him.

But then comes the question as to what terms this decree in his favor shall be subject to. The Court below in India were of opinion that he should only be entitled to recover the property after the Rani's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property for Rs. 14,000, which appears to have been an existing mortgage at the time of the conveyance in 1854. A further question, however, has been raised on the part of the appellants. The appellants say, that assuming this mortgage to have existed, and that there were some debts due at the time of the conveyance on the part of the testator, that then the widow would be enabled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated. They apprehend the law to be this, that Rani Dhun Kowur, who may be considered as very much in the position of a Hindu widow, might have sold the estate absolutely if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator possessed an income of somewhere about a lakh of rupees, minus the Government revenue of Rs. 20,000, leaving him an income in round numbers of about £8,000 per annum. He is shown at the time of his death to have owed a certain debt of Rs. 9,000, which was subsequently increased to Rs. 22,000, and was paid off in another way ;

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therefore we have nothing to do with that. He is also shown to have owed a debt of Rs. 10,000 at the time of his death, that is £1,000. A man with an income of £8,000 a year is shown on his death to have owed a sum of £1,000, and it is pretended that sixteen years afterwards a necessity arises for selling a considerable portion of his real estate, to pay this debt of £1,000, plus some £400, which had been subsequently contracted by the Rani. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, thier Lordships think it unnecessary further to dwell upon this point.

The only question that remains, then, is whether the plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the Rs. 14,000. On the whole their Lordships are of opinion that the judgment of the High Court was right; that, this mortgage of Rs. 14,000, subsisting upon the estate at the time of the sale and having been paid by the purchaser, it is equitable that, when the plaintiff reclaims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the plaintiff himself would have to meet.

For these reasons their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty that both appeals should be dismissed, and that there should be no costs. But in order to render the intention of the Court more clear, their Lordships will recommend that the following words be added to the declaration: "and to be put in possession of the said property after the decease of Masumat Rani Dhun Kowur on payment to the said defendant of the sum of Rs. 14,000,"

The appellants will have his cost of the application for leave to enter his cross-appeal paid out of the deposit; the remainder will be repaid to the appellants' agents.

Appeal dismissed.

Agents for appellants : Messrs. *Watkins and Latty.*

Agent for respondents : Mr. *T. L. Wilson.*

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

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March 1.

CHOTAY LALL (ONE OF THE (DEFENDANTS) v. CHUNNOO LALL AND
ANOTHER (PLAINTIFFS).

Hindu Law—Inheritance—Daughter—Stridhan—Jain Law—Mitakshara.

Under the Mitakshara law the estate which a daughter takes in property inherited by her from her father, is only a qualified estate, and on her death, such property descends to the heirs of her father, and not to her own heirs.

APPEAL from a decision of Pontifex, J., dated the 1st April 1874.

One Thakoor Dass Baboo, a native of the North-West Provinces, came down to Calcutta, and having acquired certain property, died in Calcutta, in February 1860, intestate, without having relinquished the law of his birthplace. Thakoor Dass left a daughter, Luckey Bibee, aged five years, who subsequently married the defendant Chotay Lall, and died in September 1872 without issue. He also left him surviving a brother's son, named Inderhund, who died in May 1871, leaving the plaintiffs his only sons and heirs. The Administrator-General obtained letters of administration to Thakoor Dass' estate in 1861, and continued to pay Luckey Bibee maintenance thereout until her death, when he also obtained letters of administration to her estate. This suit was brought on the death of Luckey Bibee by the plaintiffs, who claimed the property inherited by her from her father Thakoor Dass. The Administrator-General was made a defendant in the suit.

PONTIFEX, J. (after shortly stating the facts) continued:—The plaintiffs insist, but the defendants do not admit, that Thakoor Dass was a Jain, and they assert that according to the laws of inheritance governing the Jains, Luckey Bibee only took the same qualified estate as a widow takes, and that, on her death, they, as heirs of her father, became entitled,

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The plaintiffs also assert that before Luckey Bibee's death, the defendant Chotay Lall became, and has since continued to be, a leper, and is therefore disqualified from inheriting to his deceased wife. If, therefore, under the law applying generally to the North-West Provinces, the Court should determine that the plaintiffs are not entitled to take the property on Luckey Bibee's death as heirs of her father, it would become necessary to try the following issues :—

1st.—Was Thakoor Dass a Jain ?

2nd.—If so, what is the law of succession applicable to Jains ?

3rd.—Is the defendant Chotay Lall disqualified to inherit on account of leprosy ?

But Mr. Kennedy, on behalf of the plaintiffs, insists that, under the Mitakshara law, apart from any peculiar law of inheritance affecting the succession to property among Jains, the deceased Luckey Bibee took only a qualified interest in the property in dispute, which interest was not transmissible to her heirs, but upon her death the property reverted to the next heirs of her father, and it was not disputed on behalf of the defendants that the plaintiffs would be entitled to the property in question in this suit, if it was established that under the Mitakshara law a daughter does only take a qualified estate in her deceased father's property similar to the qualified estate of a widow. Mr. Evans, on behalf of the defendants, nevertheless insisting that under the Mitakshara law the daughter takes an absolute interest in property descending to her from her father, which interest, on her death, descends to her own heirs and not to the heirs of her father.

Under the circumstances of the case, I considered it right that the question of inheritance, under the Mitakshara law, should be argued before trying the issues above referred to. The argument on each side, which was exceedingly able, disclosed the distracted state of the authorities on the question.

At the root of the subject for my decision is the 2nd paragraph of s. 11 of Ch. ii. of the Mitakshara. That paragraph deals with gifts by the father, mother, husband, or brother, and also with acquisitions by inheritance: in each case, the subject-matter is called "woman's property," and the

object of s. 11th is to point out the line of devolution of "woman's property." The language of paragraph 2 is general, and on the ordinary principles of construction everything which a woman inherited would, under it, become her separate property. It is almost impossible, indeed, to give any meaning whatever to the word "inheritance" unless it applies to succession from a father. It is true that a woman may inherit from her son, grandson, or great-grandson, but in those cases she does not take as a separate heir, being only a preferential heir to her husband, but in the same degree with him and only taking before him "in the first instance" (*Mitakshara*, Ch. ii, s. 11, paras 2 and 3). That a mother does in fact, as successor to her son, take only a qualified estate, has been decided in *Narappa Lingappa v. Saktharam Krishna* (1) and *P. Bachiraju v. V. Vankatäppadda* (2).

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It has further been decided, and is now beyond controversy, that the estate which a widow takes in succession to her husband is only a qualified estate, being in fact a continuance of her deceased husband's estate rather than an inheritance from him. Nor, it would seem, can a woman inherit property from her mother as separate property, because, for a daughter to inherit from a mother, it must have been the mother's own separate property, and having once devolved as separate property, it ceases to be ranked as such.

It seems doubtful whether a sister can inherit to a brother (2 *Strange's H. L.*, p. 244) except in Bombay, where it has been decided that she can—*Bhaskar Trimbak Atharya v. Mahadev Ramji* (3) and *Venayack Anundrow v. Luxumeebass* (4). If she cannot inherit from a brother (except in Bombay), then the only predecessor to whom the word inheritance could apply in paragraph 2 of s. 11, of Ch., ii of the *Mitakshara* would seem to be a father.

It appears to me, therefore, that if this case was uncovered by authority, property taken by inheritance by a woman from her father would be her separate property unless the words

(1) 6 Bom H. C. Rep., 215

(3) 6 Bom H. C. Rep., O. C., 1.

(2) 2 Mad. H. C. Rep., 402.

(4) 9 Moore's I. A., 516.

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unqualified words of the Mitakshara, rather than explain them away, or in effect reject them, by the application of principles of which, after all, we have only a hazy and doubtful knowledge.

Under the circumstances of the case, I think, all parties should have their costs on scale No. 2 out of the estate, the suit closely approaching the nature of an administration suit, and the defendant being brought before the Court by the suit of the plaintiff.

From this judgment the defendant Chotay Lall appealed.

The appeal came on before Couch, C.J., and Macpherson, J., who remanded the case for the trial of the issues, as to whether Thakoor Dass Baboo was a Jain, and, if so, what was the law of succession applicable to jains? the issue as to Chotay Lall being a leper was abandoned. The following was the judgment of the lower Court passed after remand

PONTIFFEX, J.—In this case the intestate Thakoor Dass was a Jain and came from the North-Western Provinces to Calcutta fifty years before his death, resided in Calcutta until his death, and married in Calcutta a wife from the North-West Provinces. While in Calcutta he worshipped at a Thakoor Bari dedicated to the god Parishnath, at which only Jains worshipped, and at which the worship was conducted by North-West Province Brahmins. His religious ceremonies were always performed by Brahmins from the North-Western Provinces, and never by Bengali Brahmins. I think it clear from the evidence taken in this case and from the authorities collected and followed in the case of *Bhagvandas Tejmal v. Rajmal* (1), that the Jains are Hindus, differing indeed from the main body of Hindus in certain of their religious beliefs and not observing all their ceremonies, but having religious beliefs and ceremonies in common, and intermarrying with the other Hindus. This being so, I can see nothing to take this case out of the general rule that succession is governed by the personal law of the intestate. In this case the law generally applicable to Hindus in the North-Western Provinces was originally the personal law of Thakoor Dass. When the intestate came to Calcutta, he showed his intention to retain

(1) 10 Bom. H. C. Rep., 241.

that personal law by continuing to have all his ceremonies performed by Brahmins from the North-western Provinces only. I therefore find that this case is governed by the law of the Mitakshara. With this finding I leave the costs of trying this issue to be dealt with by the Appellate Court. The costs of the administrator-General on scale No. 2 will, however, come out of the estate.

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Chotay Lall again appealed.

Mr. *Montrieu* and Mr. *Palit* for the appellant.

Mr. *Kennedy* and Mr. *Lowe* for the respondent.

Mr. *Montrieu* for the appellant.—Taking the finding of the Court below as to the Mitakshara being applicable to this case, it is submitted that the provision of that law which applies is Ch. ii, s. 11, para. 1. and there it is laid down clearly and distinctly that property taken by inheritance by a woman from her father is her separate property. This is the plain construction of the text, and is supported by *Vijiarangam v. Lakshuman* (1): It may be contended that the Bombay Court was guided by the *Mayukha*, which is not an authority here; but, by reference to the judgment of West, J., it will appear that they were guided by the words of the text of the Mitakshara. [Couch, C.J.—Is there any judgment of the Courts here to be found which agrees with the Bombay Court?] No, but it has never been laid down that the Mitakshara should have one construction put on it here and another in Bombay; moreover it is submitted that the meaning now contended for is the plain and obvious one, and so it appeared to the Court below. Dr. Rör translates this passage more closely than Colebrooke, and he renders the sanskrit term *adi* “and such like:” he says “by the word *adya* (is meant property) obtained by heritage, buying, partition, acceptance, finding; this (description of) *stridhan* is mentioned by Menu and other sages.” A daughter is in many respects received as a son, and any arguments which may be based upon the qualified estate taken by a widow, do not apply to an estate inherited by a daughter from her father.

(1) 8 Bom. H. C. Rep., O. C., 244.

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The text of the Mitakshara further shows the character of this estate, and points out that it secunds to the daughter's heir and does not revert back to the next taker from the father. The author of the Mitakshara clearly takes an entirely different view of the daughter's heritage from that taken by Jimuta Vahana. Of the view taken by the latter, Jagannatha although a Bengal lawyer himself, says :—" In truth, Jimuta Vahana alone contends for the succession of her father's heirs, after the death of the daughter, to the patrimony which devolved on her by the failure of male issue, and he does not acknowledge the property of the husband in the wealth of his wife ; but those who do not acknowledge the husband's claim must not admit the succession of the father's heirs to the patrimony which has devolved on the daughter, for no text or reasoning shows it ; " see Colebrooke's Dig., Bk. v, Ch. ix, commentary on text 470. The other side will rely upon *Sengamalathmmâl v. Valaynda Mudali* (1), but it appears from the judgment that there the learned Judges applied the rule of the Bengal school, which was clearly wrong, as the Dayabhaga differs in many important respects from the law as laid down by Vijnyanesyara.

Mr. Kennedy for the respondent.—A daughter, under the Mitakshara law, only takes a limited estate in property inherited from her father. This contention is supported by the decisions of the Courts here ; see *Mussamut Gyan Koowur v. Dookhurn Sing* (2) and *Sheo Sehai Sing v. Mussamut Omed Konwur* (3). It is also supported by the decisions from the North-West ; see *Ram Swarath Pandey v. Baboo Basdeo Singh* (4) and *Mussamut Ramdam v. Beharee Lall* (5). It is impossible to distinguish on principle between the estate taken by a widow and that taken by a daughter. The law in the Bombay Presidency, as stated in *Vijjarangam v. Lakshuman* (6), is different from the law which prevails here. For most purposes a wife becomes incorporated with her husband's family, and her estate

(1) 2 Mad. H.C. Rep., 312.

(2) 4 Sel. Rep., 330.

(3) 6 Sel. Rep., 301.

(4) 2 Agra H. C. Rep., 168.

(5) 1 Allahabad H. C. Rep., Pt. vii, 114.

(6) 8 Bom. H. C. Rep., O.C., 244.

goes to her husband's heirs—*Mussamut Thakoor Deyhee v. Rai Baluk Ram* (1). When once property has descended as *stridhan* it cannot devolve so any longer.

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Mr. Montriou in reply.

The judgement of the Court was delivered by.

COVEN, C.J. (who, after shortly stating the facts, continued) :— Pontifex, J., by whom the case was heard, held that the estate which the daughter Luckey Bibee took, on the death of her father, was only a qualified one, and that on her death, the plaintiffs, as heirs of her father, became entitled to the property in dispute. And upon the case being sent back by me and Macpherson, J., before whom it came in the first instance, to try the issues which had been raised, the first of which was, was Thakoor Dass a Jain? and the second, if so, what is the law of succession applicable to Jains? the learned Judge found that the case should be decided according to the law of the North-Western Provinces. We have therefore to determine whether, according to that law, the decision of the learned Judge is right.

The first authority on the subject that I am aware of, is *Mussamut Gyan Koowur v. Dookhurn Singh* (2), in which it was held that by the Hindu law (it being a case from Behar) a daughter had no power to alienate by gift her ancestral property to the detriment of the other heirs of her father. The reply of the Hindu Law Officers of the Court who were asked to declare according to the Mithila and Western schools of law, whether Gyan Koowur (the daughter) "was competent to bestow the estate in gift on Jaga Koowur; and, if not, who was entitled to the estate on her decease,"—which is the very question in this case,—was, "When a person dies, leaving no male issue, the widow who succeeds to his estate has no right to alienate any part of it, except for religious purposes; and therefore the daughter, whose right of inheritance is weaker, that is, who only succeeds on failure of the widow, *a fortiori*, can have no such right. Now it appears from the decree of the Sudder Dewanny Adawlut, dated 6th of October 1814," (this is the fact which applies particularly to the present case) "that the property

(1) 11 Moores I. A., 139.

(2) 4 Sel. Rep., 330,

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in question is ancestral, and not Gyan Koowur's peculiar property (*stridhan*), and also it seems from the deed of gift that such gift was not made for religious purposes. According; therefore, to the law as current both in Mithila and the West, the deed is invalid ; such being the case, the property will go, after her death, to the nearest heir of her father, Kehur Singh, then living. For, as in the case of the widow, the property goes on her decease not to her heir, but to the nearest heir of her husband who may be then living, so the same rule is to be observed *a fortiori* as regards the daughter."

The next decision on the subject is *Shoo Sehai Singh v. Musamut Omed Koowur* (1), in a suit relating to the same property. It was held that there being a sister's son's son, and a daughter, the former succeeded and that *per capita* and not *per stirpes*. The Court in their remarks say :—" There is no doubt that the sister's son's sons were very distant indeed in the order of succession, and in fact are not included among the heirs, by almost the whole of the Hindu legal authorities. As, however, under no circumstances, can the daughter succeed to ancestral property inherited by her mother, the Court considered, under the *vyavasthas* of the Pundits, that the plaintiffs had the better right to the estate of Kehur Singh, the common ancestor of the parties."

We have next a decision of the Sudder Court in *Heralal Baboo v. Musamut Dhuncoomary Beesee* (2), where it was held that the estate of a Hindu proprietor having devolved on his three daughters qualified to succeed him, they held the property during lifetime only, and not as their *stridhan* ; that so long as any one of the daughters survived, no daughter's son could inherit ; and that as no son survived when all the three daughters died, the plaintiff, as heir of the deceased proprietor, succeeded to the estate.

The decision in this case appears to have been founded upon a passage in Sir William Macnaghten's work, p. 22, where he says :—" But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male.

(1) 6 Sel. Rep., 301.

(2) S. D. A., 1862, p. 190.

According to the law as received in Benares and elsewhere, it does not go, as her *stridhan*, to her husband or other heir; and according to the law of Bengal also, it reverts to her father's heirs." 1874
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The two decisions in the North-Western Provinces,—*Buryar Singh v. Mussamut Hunsee* (1) and *Mussamut Ramdan v. Beharee Lall* (2),—do not seem to me to be in point on this question; but in *Punchanund Ojhah v. Lalshan Misser* (3), we have a decision of this Court in the case of a mother inheriting from her son. The learned Judges held that, on the death of the mother, the property went to the heirs of the son, and they said that the rule was the same in the case of a woman inheriting from her father. More recently there are two decisions in this Court, one of them *Deo Persad v. Lujoo Roy* (4), by Phear

(1) 2 Agra H. C. Rep., 166. The case cited from the Agra Reports in the course of the argument was *Ram Swaruth Pandey v. Baboo Basdeo Singh*, 2 Agra H. C., Rep., 168.

(2) 1 Allahabad H. C. Rep., Pt. vii., 114.

(3) 8 W. R., 140.

(4) *Before Mr. Justice Phear and Mr. Justice Ainslie.*
The 28th May 1873.

DEO PERSAD (PLAINTIFF) v. LUJOO ROY (ONE OF THE DEFENDANTS).
Hindu Law—Inheritance—Daughter, Alienation by

A daughter inheriting property from her father takes a life-interest only in such property, and has no power of alienation beyond her lifetime. The heir of the father on her death takes the property as heir of the ancestor, and not as her heir.

SUIT for declaration (of the plaintiff's right to, and for possession of, certain property by setting aside two kobalas executed in favor of the defendants.

The property in question originally belonged to one Munbodh Singh, who

died, leaving two widows and two daughters, Chumroo Kooer and Dilun Kooer, as his heirs. After the death of the widows, the daughters succeeded to, and entered into possession of, the property in equal shares. Dilun Kooer executed, on 23rd March 1851, a kobala of her share to the defendant

No. 1, by whom the other kobala was executed in favor of defendant No. 2 the present respondent, on 19th July 1851. Dilun died in 1857 without leaving any male issue, and the present suit was brought by the plaintiff, the only son of Chumroo Kooer, on attaining his majority, to set aside the kobalas and obtain a declaration of his right to take by inheritance the property which Dilun inherited from Munbodh Singh. The suit was substantially defended only by the defendant

No. 2, who pleaded limitation and that the plaintiff had no right to sue. The Munsif found that the suit was not barred by limitation but that the plaintiff, not having been in existence at the time when the kobalas

* Special Appeal, No. 1459 of 1872, against a decree of the Judge of Zilla Tirhoot, dated the 21st July 1872, affirming a decree of the Munsif of Morarhpore, dated the 31st January 1872.

1874 and Ainslie, JJ., and another *Dowlut Koor v. Burma Deo Sahoy* (1), by Phear and Morris, JJ. in which the same law laid down.

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were executed, had no right of action. He, therefore, dismissed the suit as against the defendant No. 2, and gave the plaintiff a decree only in respect of his claim against the other defendants, who admitted the alienation to them to be invalid.

On appeal, the Judge concurred in the finding that the plaintiff was not in existence at the time of the execution of the kobalas. He also was of opinion that, in the absence of any heir who would take after her death, Dilun had an absolute estate, and was competent to effect the alienation which it was sought to set aside. He therefore confirmed the decision of the Munsif, dismissing the suit.

The plaintiff appealed to the High Court.

Baboo *Mohes Chunder Chowdhry* and *Kally Kishen Sen* for the appellant.

Baboo *Chunder Madhub Ghose*, *Atubeenash Chunder Banerjee*, and *Harayhar Nath* for the respondents.

The judgment of the Court was delivered by.

PHEAR, J.—We think that this question, upon which the lower Appellate Court decided the case, is concluded by authority adversely to the view which the lower Appellate Court took of it. It appears to us that there is no doubt now on this side of India that in such a case is this, where the daughter takes her father's property upon the death of the widow in default of a son, she takes the inherit-

ance with a qualified powers as regards alienation. She is in respect of alienation in no better situation than the widow; and any alienation which may be made by her is liable to be called in question by the heir of her father, who will take the inheritance at her death in default of a valid alienation. Whatever may be the state of the authorities in the Bombay presidency (as for instance a case (d) cited on the part of the respondent) here, we think, there is no doubt that on the death of the daughter who has taken the property as I have said, it is the heir of her father (the ancestor) who succeeds, and who takes it as the heir of the ancestor, not as her heir. It is not necessary to enquire whether the plaintiff was in existence or not at the time when the alienation was effected, because we think that at no time during the daughter's life had she an absolute unqualified power of alienating the property. With these views we think that the decision of the lower Appellate Court must be reversed and the case be sent back to that Court for retrial on the merits.

Costs will abide the event.

(1) Before Mr. Justice Phear and Mr. Justice Morris.

The 12th May 1874.

DOWLUT KOOR (PLAINTIFF) v. BURMADEO SAHOY AND ANOTHER (DEFENDANTS).*

Hindu Law—Mitakshara—Inheritance.—Daughter's Estate.

Under the Mitakshara, the unmarried daughter succeeds only in priority to her

* Special Appeal, No. 1336 of 1873, against a decree of the Judge of Zilla Sarun dated the 27th March 1873, reversing a decree of the Subordinate Judge of that district, dated the 22nd April 1872.

(a) See *Bhaskar Trimbeh Acharya v. Mahadev Ramji*, 6 Bom. H. C. Rep. O. C., 1.

In the High Court at Madras the same question as we have before us arose in *Kattama Nachiar v. Dorasinga Tevar* (1). 1874
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married sisters, and not to the ultimate exclusion of such sister's right of inheritance from their father. Therefore, when a Hindu, under the Mitakshara, died, leaving two daughters, one married and the other unmarried, and the latter succeeded to the father's estate, and then married and subsequently died, leaving a son and her sister, her surviving,—*Held* that the sister was entitled to succeed to the property as the next heir of the father.

Baboo Mohesh Chunder Chowdhry and Chunder Madhub Ghose for the appellant.

Mr. R. E. Twidale and Baboo Hem Chunder Banerjee and Boycant Nath Doss for the respondents.

The facts of this case appear sufficiently in the judgment of the Court, which was delivered by.

JESAR, J.—In this case one Jussodah Koor, daughter of Brijbehary Lall, upon the death of her mother, took the property which is the subject of suit, and which had belonged to her father Brijbehary Lall, deceased, in preference to her sister Dowlut Koor. The reason of her being preferred to her sister in this respect being that she was then unmarried, whereas Dowlut Koor was married.

Jussodah Koor after thus obtaining the property married, and it is alleged in this suit that she has a son, one Jankee Prashad, who is still living. Jussodah Koor herself has lately died, and Dowlut Koor, her sister, who survives her, now makes claim to the property in succession to her: and the question is, whether Jussodah Koor took the property on the death of her mother for an absolute estate, or whether she took it only for the estate

of the female heir of her father Brijbehary Lall.

The right of the daughters under Mitakshara law to inherit the property of their father in default of male heirs and in default of his widow, rests on the provisions of s. 2, Ch. ii of the Mitakshara. There appears in this section to be no restriction upon this right of inheritance or limitation in the nature of the tenure by, which the daughter holds her father's property, when she thus succeeds to it; but at the same time neither is there in the Mitakshara any expressed restriction or limitation in this respect as to the right of the widow in the property which she takes upon her husband's decease. In both cases alike the Mitakshara is very concise, and merely says that the widow or the daughter as the case may be, in default of male heirs, takes the property; nevertheless the Courts of this country and the Privy Council have unquestionably declared a limitation of right in the mother's case, and they found it upon the general character and situation of the female heir. In the *Collector of Masulipatam v. Cavalry Vencata Narainappa* (a), the Privy Council makes the restriction of the widow's right depend upon general considerations which are just as applicable to the case of the daughter as to the case of the widow, in other words which are common to the circumstances of all female members of the joint Hindu family. The restriction or limitation upon the widow's right is two-fold, namely, in regard to the power of alienation and also in regard to the persons who succeed to the

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(a) 8 Moore's L. A., 529; see, p. 551.

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There the Chief Justice and Holloway, J., held that the daughters of the first defendant (that is the person who had inherited from her

property upon her death; and we should be bound upon the authority of this case, followed as it was by the Privy Council itself again in the case of *Musamat Thakoor Deyhee v. Rai Baluk Ram (a)*, to hold that, notwithstanding the absence of an express enactment upon this point, so to speak, in s. 2 of Ch. ii of the Mitakshara, still the same limitation in the power of alienation, and the same restriction with regard to the persons who succeed, exist in the case of a daughter as in the case of a widow. But we have further the opinion of Sir William Macnaghten, who says, 1 Hindu Law, p. 21:—"In default of the widow, the daughter inherits, but neither is her interest absolute." In *Strange's Hindu Law*, p. 139, the same doctrine is laid down: and the late Chief Justice, Sir Barnes Peacock, in the case of *Nobin Chunder Chuckerbutty v. Guru Persad Doss (b)* expressly stated that the same restrictions and peculiarities which attach, to the widow's rights in her husband's property, also attached to the rights of the daughter and other female heirs. It is true that under para. 3, s. 2, Ch. ii of the Mitakshara the unmarried daughter takes solely when there is a competition between an unmarried daughter and a married daughter, and in the doctrine of the Bengal school which has been evolved from Ch. xi, s. 2, para. 30 of the Dayabhaga, the right of the unmarried daughter who thus takes in preference to her married sisters is held to resemble an absolute right in this respect, namely, that if she dies, leaving a son and also sisters, the property

goes to her son and not to her sister.

But the reason for this special course of descent in that case is to be found in special words in para. 30, s. 2, of Ch. xi of the Dayabhaga itself, words which are introduced by the commentator, and which are not to be found in the Mitakshara, nor are any words equivalent to them. These words are simply parenthetical, and however good a foundation they may afford for the doctrine of the Bengal school, they do not give any reasons for modifying or affecting the provisions of the Mitakshara in those districts where the Dayabhaga is not the governing text book. And Macnaghten, after the passage which has just been referred to, goes on to say: "According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession."—(And that is so also under the Mitakshara).—"If there be no maiden daughter, then the daughter who has, and the daughter who is likely to have male issue, are together entitled to the succession" and so on. And at page 24, he says:—"If one of several daughters, who had, as maidens, succeeded to their father's property, die, leaving sons and sisters or sister's sons, then according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sister's sons." Afterwards he adds:—"This distinction does not seem to prevail anywhere but in Bengal."

A decision of the Bombay High Court was relied upon by the lower Appellate Court (c), but it has already

(a) 11 Moore's I. A., 139.

(b) B. L. P., Sup. Vol., 1008, at p. 1015.

(c) *Bhaskar Trimbak Acharya v. Mahadev Ramji*, 6 Bom. H. C. Rep., O. C., 1.

father the suit being brought in her life-time for a declaration of title) were not her rightful successors to the zemindari, and that the plaintiff as the eldest grandson of the *istimrar* zemindar, was entitled to be, preferably to the second defendant, declared reversionary heir to the zemindari on the death of the first defendant. Sir Colley Scotland, the Chief Justice, said:—"With reference to the second question raised by the appellants' objection to the declaration of the plaintiff's right, whether the zemindari is the *stridhan* property of the first defendant, I need not add anything, as my conclusion on the first question is obviously decisive of it. But I ought perhaps to say with reference to the arguments (contradictory to those on the first question) advanced on behalf of the appellants, that the authorities do not, I think, present any ground for them. There are some texts and comments recognizing as *stridhan* paternal property devolving on a daughter, but they appear to me to relate only to an appointed daughter who was declared to become by the appointment the third description of son. . . . The fundamental principle of the law of successions, too, is adverse to the contention of the appellants, for if paternal property passing to a daughter were to become her *stridhan*, the succession would pass away from

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been held by this Court that that decision does not correctly express the law in regard to the daughters' succession to their father's property as it obtains in this Presidency; see *Deo Persad v. Lujoo Roy* (a).

On the whole, we have no doubt that although under the Mitakshara law, as well as under the law of the Bengal school, the unmarried daughter takes the whole of the property in preference to her married sisters if there be any, under the Mitakshara she only takes in priority to them and not to the ultimate exclusion of their right to inherit from their father. Upon her death, we think that the property must go according

to the ordinary rules which govern the descent of property on the decease of the female heir, that is, it goes to the next surviving heir of the last full taker of the property. In the present case, it must go to the nearest heir of Jussodah Kooer's father, that is, her sister Dowlut Kooer.

In this view, we are of opinion, that the decision of the lower Appellate Court is wrong in law, that the plaintiff is entitled to a decree; and therefore the decree of the lower Appellate Court must be reversed, and the decree of the first Court affirmed with costs in this Court and in the Court below.

(a) *Ante*, p. 245.

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those who were the nearest heirs by virtue of their capacity to offer oblations to the last male owner." Holloway, J., rested his judgment upon the same grounds. Towards the end of it he said : "On the question whether property coming to women by inheritance is *stridhan* or not, I do not consider it of the least consequence for the decision of this case to determine. By calling it *stridhan* we should not be in the least assisted to the solution of the order of its transmission, for the various sorts of *stridhan* are transmitted in very various ways. . . . I will shortly sum up the grounds upon which I come to the conclusion that the decree of the Civil Judge ought to be affirmed." The learned Judge then states the grounds to be : "1.—The principle of the law is to determine the descent by the nearness or remoteness of connexion with the offering ; there is no taking by or through or by virtue of any individual, the only effect of relationship is to connect with that offering; the very name *sapinda* is the clearest etymological proof of the predominant notion. 2.—That this principle is the reason for the daughters taking at all. 3.—That neither in this nor in any other case has what is called vesting, the slightest influence ; the very notion of heritable blood is, as applied to Hindu law, meaningless. 4.—The principle of the law is the only safe ground for deducing a rule of descent ; the attempt to argue from subordinate propositions will as the cases show, lead to a departure wider and wider from the real reason of the law." As far as the law in that part of India is the same as in the North-Western Provinces, this is an express authority upon the question before us.

On the other hand, there are certain cases in the High Court at Bombay which were relied upon as being opposed to the doctrine which appears to have been consistently held both by this Court and the High Court at Madras. One of them is *Franjivandas Tulsidas v. Devkuvarbai* (1), and is known by the name of *Devkuvarbai's* case. It appears to have been there laid down by the Supreme Court at Bombay, that a widow is entitled to the moveable property absolutely and to the immove-

(1) 1 Bom. H. C. Rep., 130.

able property for life, and subject to the widow's interest, the moveable property descends to the daughters absolutely.

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It appears from the judgment of the Chief Justice, Sir Matthew Sausse, and Sir Joseph Arnould in *Venayak Anandray v. Lakshmaibai* (1), that this decision was based mainly on the authority of the *Mayukha*, an authority in that part of India. The judgment in the latter case, which seems to have been written by Sir Matthew Sausse to be forwarded to the Privy Council, contains this passage, p. 121 :—" In *Devkumarbai's* case this Court held that the widow of an intestate, childless, and separated brother takes the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favor of the widow. In the *Mitakshara* on Inheritance, Ch. ii, s. 1, entitled ' Right of the widow to inherit the estate of one who leaves no male issue,' the commentator, after declaring the order of succession (see para. 2) in words quoted from *Yajnavalkya*, and after discussing various interpretations and opinions, states the conclusion (para. 39) as follows :—"The learned Chief Justice then quotes the passage. He is speaking of his own judgment in the former case, and says that he based it on the authority of the *Mayukha*.

That next case at Bombay is *Navalram Atmaram v. Nandkishor Shivnarayan* (2). There three of the learned Judges of that Court held that, according to the Hindu law of inheritance as received in the Bombay Presidency, immoveable property inherited by a married woman from her father, whether or not it be strictly entitled to the name of *stridhan*, descends on her death to her own heirs, and not to her father's descendants, according to what is called the " melancholy succession ;" and that an inheritance descending on a married woman from her father classes as *stridhan* and descends accordingly. It is to be remarked upon this decision that the learned Judges considered the text of *Menu* and the opinions of the commentators and other authorities on Hindu law, but they do not appear to have been

(1) 1 Bom. H. C. Rep. 117.

(2) 1 Bom. H. C. Rep., 209.

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aware of (at least they do not notice) any decisions of the Courts on this side of India on the subject; and in considering whether we should treat this case as an authority, this is very material. We may fairly say that a judgment of another High Court in which no notice was taken of the decisions of this Court upon the point ought not to receive the same respect from as it would receive if the learned Judges had considered the decisions on this side of India.

The next case is *Bhaskar Trimbak Acharya v. Mahadev Ramji* (1), in which Sir Joseph Arnould, who was one of the Judges in the former case sat alone. He held that the property acquired by a married woman by inheritance, with the exception of property inherited by a widow from her husband, classes as *stridhan*, and descends accordingly. He appears to have held this upon the authority of *Venayak Anandray v. Lakshmi Bai* (2). He says:—"Mr. Marriott's position, that upon the estate vesting in Lakshmi as sister of Vithal, her son Ramji Krishnaji, and his son Mahadev Ramji thereupon became jointly interested therein as copartners with Lakshmi, must, in my opinion, be regarded as untenable; it seems opposed to the principles established in Hindu law regarding property coming by inheritance to women, and is inconsistent with the position already adverted to, as established by the case of *Venayak Anandray v. Lakshmi Bai* (2), that the sister takes absolutely." But the learned Judge proceeds to notice the decision of the Judicial Committee of the Privy Council and the text of *Katyayana*, and allows that in the case of inheritance by a widow from a husband, the rule laid down in the *Mitakshara* does not apply. So far he departs from what had been previously decided, and it will be seen that in this he differs from the judgment I am about to notice of West, J., who gives as his opinion that the passage in the *Mitakshara* applies to the case of a widow inheriting from her husband just as much as to that of a daughter inheriting from her father. The case is *Vijiarangam v. Lakshuman* (3).

(1) 6 Bom. H. C. Rep., O. C., 1.

(2) 1 Bom. H. C. Rep., 117

(3) 8 Bom. H. C. Rep., O. C., 244.

Now the decision in that case is founded upon the Mayukha. The Chief Justice says :—"The question of Hindu law arising from these facts is a difficult one, but looking (as I think we are in this island bound to do) to the Mayukha, for the law to regulate this case. Thamabai must be regarded as the legal representative of Yesubai in respect of the property in question in this suit, and not the plaintiffs:" and West, J., says :—"We must fall back either on the Mayukha, which is equally inconsistent with a current of decisions derived from the analogies of the Bengal law, or else on the Bengal law itself." But the learned Judge took the opportunity of this case coming before him to discuss at considerable length, and with much ability, the meaning of the passage in the Mitakshara, and to comment upon the authorities. He, too, does not appear to have noticed any of the decisions on this side of India, and what I have already said with regard to the decision in *Navalram At. maram v. Nandkishor Shivnarayan* (1) will apply to this part of his judgment. He lays down that the Mitakshara includes in *stridhan* all property acquired by a woman by inheritance, which is contrary, as I have already said, to what had been laid down by Sir Joseph Arnould in the case of *Bhaskar Trimbak Acharya v. Mahadev Ramji* (2), and contrary also to the decision of the Privy Council in *Bhugwundeen Doobey v. Myna Baes* (3). He argues, as I understand him, that this case was not rightly decided. It appears to me that what Holloway J., said, which I have read, applies very much to this judgment of West, J. Certainly, when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit, and the decision of the High Court at Madras upon a similar law, in which no substantial difference can be pointed out, with reference to this question, we ought not to unsettle the law which appears to have been received on this side of India for the last fifty years, on account of the opinion of a Judge of the High Court at Bombay, however learned he may be. The consequences, at the present time, would be most serious. Courts ought always to bear in mind that it is no light matter to reverse a series of

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(1) 1 Bom. H. C. Rep., 209.

(2) 6 Bom. H. C. Rep., O. C., 1.

(3) 11 Moore's I. A., 487.

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decisions which must have been acted upon for many years, and have been regarded as declaring what was the law.

It appears to me that the conclusion which Pontifex, J., arrived at in this case is the right one, and that his decision ought to be affirmed. The costs of the hearing on remand in which the appellant really was successful, ought to be regarded as part of the costs of the original hearing, and should be allowed in the same way as those costs were allowed, viz., out of the estate. The appellant must pay the costs of this appeal on scale No. 2.

Appeal dismissed.

Attorney for the appellant : Baboo B. M. Doss.

Attorneys for the respondents : Baboo G. C. Dutt, and Messrs Beeby and Rutter.

APPELLATE CIVIL.

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 March 24.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson,
 and Mr. Justice Ainslie.*

CHUNDER NARAIN SINGH, DEPUTY MAGISTRATE OF CUTWA (DEFENDANT), v. BRIJO BULLUB GOOYEE (PLAINTIFF).*

Beng. Act VI of 1868, Sched. K—Act XVIII of 1850—Judicial Act—Right of Action—Liability of Magistrate.

The removal by a Magistrate of an obstruction in the exercise of the powers conferred upon him by Sched. K, cl. 1 of Beng. Act VI of 1868 is not a judicial act; and the Magistrate is therefore not protected by Act XVIII of 1850

* Appeal, No. 1 of 1874, under s. 15 of the Letters Patent of the 28th December 1865 from a judgment of Mr. Justice Markby, dated the 22nd December 1873 in Special Appeal, No. 1550 of 1872, from a decree of the Officiating Judge of East Burdwan, dated the 24th of June 1872, affirming a decree of the Munsif of Cutwa, dated the 9th of January 1872.

from a suit in the Civil Court to try the question of the right of the person against whom the order was made to create the obstruction and for damages.

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THE special appeal preferred in this case was first heard before Markby and Birch, JJ., who differed in opinion. The facts material to this report are sufficiently stated in the judgment of

MARKBY, J.—In this case it appears that one Brijō Bullub Gooyee, the present respondent, was a resident of Cutwa, and that on the information of the head constable of that town proceedings were taken against him by the Deputy Magistrate (who was also Chairman of the Town Committee) under cl. 1 of Sched. K of Beng. Act VI of 1868. The account of these proceedings which has been given does not very clearly show what was done. It however appears that the respondent was convicted of an offence under that clause and fined Rs. 20. He was also under the same clause ordered by the Magistrate to remove three steps or sets of steps forming the approaches to two houses which were his property. These three sets of steps the Deputy Magistrate had found to have been newly erected. The respondent removed the steps, but subsequently brought a suit in the Civil Court against the Deputy Magistrate, the Collector, and the Head Constable of the town to have it declared that he had a right to ascend to his two houses by these three sets of steps and for damages. As regards the Collector, the case was at once dismissed, the Munsif holding that there was no ground whatever for making him a party.

As regards the merits of the case, the Munsif found upon the evidence that the steps had been recently erected on the site of old steps; these steps having, for a very long period, been the means of approach to the respondent's houses, which were separated from the road by an open drain. This being so, the Munsif held that they did not come within cl. 1 of Sched. K. of Beng. Act VI of 1868, putting upon that clause the very reasonable construction that it did not apply to any part of a building recently pulled down and re-erected on the old site. He accordingly declared the right of the respondent

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to pass and repass to and from his two houses by the steps in question, and directed the appellants to pay Rs. 3 as damages in their representative capacity as officers of the Cutwa Municipality. By this I understand it to be meant that the respondent was to receive compensation to that amount out of the Town Fund, but that the defendants were not to be personally liable.

It was however objected by the appellant that the Munsif had no jurisdiction to try this suit. The objection appears to have been then based upon the provisions of s. 92 of Beng. Act VI of 1863. But the Munsif in my opinion correctly held that the only effect of that section was to bring the persons exercising the powers of this Act as executive officers under the control of the Commissioner, and did not in any way affect the jurisdiction of the ordinary Civil Court, and considering that s. 88 provided for the conditions under which a suit would lie against the Magistrate, he thought it clear that this suit might be maintained.

The Deputy Magistrate, who is the present appellant, did not appeal against this decision so far as the merits of the case are concerned. But he appealed on the ground that the Civil Court had no jurisdiction to entertain the suit, relying on the same arguments as were used in the Court below. The District Judge took the same view as the Munsif, and dismissed the appeal. Upon the case made before him, the District Judge could come to no other conclusion.

In this Court to which the Deputy Magistrate has now appealed, it is again contended by the appellant that the suit will not lie. He puts his case here on the ground that no suit can be maintained against him for an act done judicially and within his jurisdiction, or with the *bona fide* belief that he had jurisdiction. This is the only ground of appeal, and it is evidently founded on the provisions of Act XVIII of 1850. This is a defence which ought to have been distinctly pleaded and raised by the issues, as it depends on certain allegations of fact, the truth of which ought to be investigated. The appellant, however, has not asked us to send the case back, but has asked us to hold upon the facts as they appear on the judgments of the Courts below that the defence is well founded, and no

objection to our entertaining the appeal upon this ground has been taken by the respondent. I therefore proceed to consider the case as if the Act had been relied on in the Courts below.

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That Act provides that "no Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of."

In considering whether the appellant is protected by this Act, I shall assume that he acted in good faith. Therefore, although the steps are now found not to be such as come within cl. 1 of Sched. K, so that the defendant had no jurisdiction to remove them, still he comes within the protection of this Act, if he was acting judicially, and in discharge of his judicial duty. This therefore, in the view that I take of the matter, is the important question for consideration,—was the appellant in this case acting judicially and in discharge of his judicial duty within the meaning of the Act XVIII of 1850, when he ordered these steps to be demolished? If he was, he is entitled to the protection given by the Act, otherwise not.

Now, as a general rule, every Magistrate does act judicially in discharge of his judicial duty whenever he performs any of the duties which are imposed upon him by the law. The duties which he usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any persons whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be. This has

1874 been so held in England—*Tozer v. Child* (1)—and I do not see any reason to doubt that the same would be held here.

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That it is, however the judicial character of the act which alone gives the protection may be seen by comparing the law as applied to persons who act under somewhat similar conditions, but not judicially. Thus it has long been the custom in England, and it is beginning to be the custom here, to confer large powers on individuals or bodies of individuals to be used for the public benefit. The persons upon whom these powers are conferred in England are generally called Commissioners, and they are placed in this position : whilst, on the one hand, they are liable for any wrongful act committed by them, they are, on the other hand, generally protected from personal annoyance and from personal liability. A public officer (generally their secretary) is made defendant in the suit, and the law allows them to defray the costs and damages in any suit brought against them out of the property entrusted to their care. Without such protection as this, no one would act as a Commissioner ; whereas a greater immunity than this would be dangerous to the interests of those with whom they come in contact.

The powers and duties contained in Sched. K of Beng. Act VI of 1868 are (with the exception of the powers to punish an offence) exactly of this character. They are powers which enable the persons in whom they are vested to protect the health and comfort of the inhabitants of the town to which they are applied. They impose upon those persons important public duties which they are bound to perform, but these duties are not, as it appears to me, judicial. The main consideration is not what are the rights of the parties concerned, but what is necessary for the health, comfort, and convenience of the public. I speak of these powers generally, for I am bound to admit that some are judicial namely the powers in certain cases to punish for an offence. And I have felt the force of the argument, that had the Legislature intended some of these duties to be judicial, and some not, the line would have been distinctly drawn. It would perhaps have been more convenient if this had

been done, but I think we can gather from the Act itself what the intention of the Legislature was. Looking only to this schedule, we find certain powers and duties are confided to the Magistrate; some of which are undoubtedly judicial, whether the others are so or not. But this is only a schedule; its place in the Act is in ss. 82, 83, and also, by reference, in s. 42, with which it must therefore be read. We thus find that it is primarily a schedule of "conservancy powers" though some other powers are mixed up in it. And s. 42 appears to me to draw the required line. That section provides that "it shall be competent to the Government to declare that all or any of the powers and authorities which are vested in the Magistrate, and the duties which are imposed upon him by the sections enumerated in Sched. B. to this Act annexed, or by any of them, shall be vested and exercised by the Town Committee at a meeting." Amongst the duties which are enumerated in Sched. B. as being capable of being so transferred, are included, therefore, that which has been exercised in this case, but s. 42 further provides that "nothing herein contained shall be deemed to confer upon any Town Committee any power to impose a fine." This appears to me to draw the required line. The powers to fine for an offence are judicial, and can be confided to the Magistrate alone; the other powers being conservancy powers are not judicial, and may be confided to the Town Committee. Unless the line be thus drawn, we should be compelled to hold that these powers, even when exercised by the Town Committee at a meeting, were judicial powers; for the same powers which, when exercised by one person are judicial, can hardly be otherwise when exercised by another. But to hold that the Town Committee when exercising these powers were acting judicially would produce a result which, having regard to the nature of that body and the ordinary mode of conducting business at a meeting, would not to my mind be satisfactory. It could not have been intended by the Legislature that a body of Town Commissioners should meet and dispose of claims to valuable rights of property without any forms of procedure or any appeal.

The office which the appellant holds will not alone protect him. The Act of 1850 very strictly confines its protection to

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persons acting judicially, and to acts done or ordered to be done by them in discharge of their judicial duties. And although there is no doubt a *prima facie* presumption that judicial officers in discharge of public duties are acting judicially, yet that is not always so. Orders made by a Magistrate under ss. 518 and 519 of the Code of Criminal Procedure, which are of a somewhat similar character, are expressly declared by s. 520 not to be judicial proceedings.

Upon the whole I have come to the conclusion that in this case the Magistrate was neither acting judicially, nor was the act done by him in discharge of his judicial duties when he ordered these steps to be removed. I think what he then did was done by him as a public officer on behalf of the public exercising conservancy powers, and that, therefore, Act XVIII of 1850 does not apply.

I have before pointed out that by the decree of the Munsif the appellant has not been made personally liable, but only as the officer of the Town Committee. No objection has been raised to this form of the decree by either side, and it seems to me reasonable and proper that it should so stand. I only refer to it as showing that a decree in this form is not open to the objection which would naturally arise against a public officer being made personally liable for an act done by him in good faith, though erroneously.

The defendant No. 3, the Head Constable, has not appealed. Whether or no, therefore, the decree could have been maintained as against him, has not been considered by me in this case, and nothing is decided upon it. From the form of the decree it is practically immaterial.

I think the appeal should be dismissed with costs.

BIRCH, J.—It is not until the case comes before us in special appeal that the real and sole defence to such an action is properly urged, and yet the case appears to be one about which the legal advisers of Government have interested themselves.

That defence is that the Deputy Magistrate was acting judicially and as the law prescribes, and could not therefore be sued.

The District Towns Act confers on the Magistrate alone the power to fine under the conservancy provisions of the Act. In respect of offences punishable under the Act, the Magistrate would have to be guided by the provisions of Act XXV of 1861 (*vide* ss. 21 and 11) in the investigation which must precede the order imposing the fine. The proceedings show that the Deputy Magistrate summoned the person accused of creating an obstruction, heard evidence for and against him, and came to a decision thereon. He dealt with the matter judicially and in good faith, and on general principles is protected from a civil action. The fact that he was also Chairman of the Town Committee in no way affects the case. The powers which he exercised, he exercised as Magistrate. It is nowhere suggested that he acted unfairly or with partiality: there is every reason to suppose that he acted under the conviction that his orders were for the public benefit, and that he was bound to issue them.

In the case of *Madhab Chandra Guho v. Kamalakant Chuckerbutty* (1), it was held that the order of a Magistrate under Ch. XX of the old Criminal Procedure Code was conclusive as regards the particular act done by him. The Magistrate had removed a bridge which obstructed a khal, and the suit was brought to set aside his order, and to have the plaintiff's right to erect the bridge declared. The suit was dismissed on the ground that a Magistrate's order passed with jurisdiction could not be set aside by a Civil Court, and that no suit would lie for a valid declaration of right against persons who had no interest in the matter. The Full Bench Ruling in the case of *Ujalmayi Dasi v. Chandra Kumar Neogi* (2) has determined that no suit will lie to set aside an order made by a Magistrate under Ch. XX of the Criminal Procedure Code, or to restrain him from giving effect to his order. S. 311 was held to bar the jurisdiction of the Civil Court in such a case. In the Madras High Court, in the case of *Chaiyangan v. R. Ragunath Row* (3), in which a Deputy Magistrate acting under s. 308, Criminal Procedure Code, caused a house to be removed as an obstruction to the high-road, and was sued for the value

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(1) 6 B. L. R., 643.

(2) 4 B. L. R., F. B., 24.

(3) 5 Mad. H. C. Rep., 345.

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of the house, it was held that although the removal of the house by the Deputy Magistrate was an act without jurisdiction, the Deputy Magistrate, though acting improperly, had acted judicially in making the order for the removal of the house, that he had acted in good faith, though on a hastily formed belief that he had jurisdiction, and was consequently protected by Act XVIII of 1850. The suit against him was dismissed.

Whether the Magistrate acts under a section of the Criminal Procedure Code, or under a special enactment of the Local Government empowering him to remove obstructions, and imposing a fine for causing them, so long as he acts judicially in a *boná fide* belief that he has jurisdiction, he, and those who execute his orders, are protected by Act XVIII of 1850 from being sued in the Civil Court on account of any such act. The words in the Act "acting judicially" must, in my opinion, be considered to extend to proceedings held by a Magistrate exercising his judgment as to whether a fine should be imposed or not under a local Act by which he is empowered to fine.

Damages are laid in the plaint so as to cover the fine imposed, under the pretence of an action to establish a right and damages for its infringement; the suit really seems to be one to recover a fine imposed by the Deputy Magistrate and get his orders set aside.

In my opinion the action will not lie. The Deputy Magistrate and his subordinate, the Municipal Constable, are, I think, protected from such a suit by Act XVIII of 1850. I would decree the appeal and dismiss the suit with costs in all the Courts.

The Judges thus differing, the opinion of Markby, J., as that of the senior Judge prevailed, and the defendant preferred the present appeal from that learned Judge's decision.

The Senior Government Pleader (Baboo Unoda Persad Banerjee) for the appellant.—The same clause in Sched. K of Beng. Act VI of 1868, cl. 1, empowers a magistrate to fine a person erecting an obstruction in the public highway, and to remove the obstruction; the two matters go together and form part of one and the same proceeding. But in order to fine the offender, the

Magistrate must first judicially find that an obstruction has been created. The whole proceeding therefore must be taken to be a judicial proceeding for punishing the offender, and every part of it is equally protected by act XVIII of 1850. Had the Legislature intended that some of the duties of the Magistrate under Beng. Act VI of 1868 were to be deemed judicial, and others executive, they would have drawn a distinction between the two classes, as they have done in the case of Town Committees, who by s. 38, cl. 5, are empowered to exercise any of the powers of the Magistrate which may be conferred on them by the Government of Bengal under s. 42; but the latter section expressly provides that they shall not have the power of fining. Magistrates were always protected. No suit could be brought to set aside an order of a Magistrate ordering the removal of an obstruction or nuisance under Act XXI of 1841.—*Government v. Choonee Lal* (1), *Sohun Patuck v. Omoola Koowur* (2), *Ramkishore Bhattacharjee v. Biseskur Bhattacharjee* (3), and *Prankishen Surma v. Ramrooder Surma* (4). No suit will lie to set aside an order of a Magistrate under Ch. XX of the Code of criminal Procedure—*Ujalamayi Dasi v. Chandra Kumar Neogi* (5), *Madhab Chandra Guho v. Kamala Kant Chuckerbutty* (6). In *Taraknath Mookhopadhyaya v. Collector of Hooghly* (7) it was held that Act XVIII of 1850 does not protect a Magistrate who has not acted with due care and attention, but on review the ruling was reversed; see *Collector of Hooghly v. Tarak Nath Mookhopadhyaya* (8); see also *Seshaiyengar v. R. Ragunatha Row* (9). By English law, too, a judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and a matter of fact so adjudicated by him cannot be put in issue in an action against him—*Kemp v. Neville* (10); see further *Collector of Patna v. Romanath Tagore* (11).

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(1) S. D. A., 1853, p. 929.

(2) Marsh., 7.

(3) *Id.*, 231.(4) *Id.*, 214.

(5) 4 B. L. R., F. B., 24.

(6) 6 B. L. R., 643.

(7) 4 B. L. R., A. C., 37.

(8) 7 B. L. R., 449.

(9) 5 Mad H. C. Rep., 345.

(10) Broom's Const. Law, 734.

(11) 7 W. B., 191.

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Baboo Mohini Mohun Roy for the respondent.—It can only serve to confuse to say that the conviction and punishment by a Magistrate under this Act cannot be separated from an order by him for the removal of an obstruction. It may be that there may be an obstruction on the road caused by an accident, or one the author of which cannot be discovered, and which has to be removed; it cannot be said that the Magistrate, in ordering the removal of it, discharges a judicial function. Although both the provisions are in the same clause, yet the two acts are very different, the conviction and the imposition of a fine are judicial acts, while the removal of an obstruction is purely an executive or ministerial act. In fact all through Beng. Act VI of 1868, there are powers conferred on the Magistrate, some of which are judicial, and others merely ministerial; and, as to the latter, there is no protection from being sued. It would be unreasonable to prevent a man from bringing a suit, the real object of which may be, as in this case, to establish a title to property. It could not have been intended by this Act to leave a party, against whom a decision had been given by a Magistrate involving a question of right to property, without the usual remedy of an appeal to the civil tribunal.

Baboo Unoda Pershad Banerjee in reply.

The following judgments were delivered :—

COUCH, C.J. (AINSLIE, J., concurring) :—In this case, which was an appeal from the judgment of Markby, J., as the senior Judge, sitting with Birch, J., the first ground of appeal is that the Magistrate in his proceeding under Sched. K of Beng. Act VI of 1868 acted judicially, and in discharge of his judicial duty, in directing the removal of the obstruction which was removed by him, and for the removal of which the plaintiff brought the suit against him and another person, and that therefore Act XVIII of 1850 is a bar to a suit against the Magistrate. The second ground is more general, being that Markby, J., ought not to have held that the powers and duties mentioned in Sched. K, with the exception of the powers to punish an offence, are not judicial.

Act XVIII of 1850 provided that no Judge or Magistrate, &c., or other person acting judicially, shall be liable to be sued in any Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he in good faith believed himself to have jurisdiction to do or order the act complained of. The object of that Act was not to introduce the rule that a Magistrate acting judicially was not liable to a suit, but the further rule that he was not liable, although the act was not within the limits of his jurisdiction, if he *bonâ fide* believed it to be.

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The question in this case is, "whether the removal of the obstruction by the Magistrate in exercise of the power given to him by the first clause of Sched. K is a judicial act.

The clause is:—"Whoever builds any wall, or erects or sets up any fence, rail, post, or other obstruction or encroachment in any public highway, or in or over any open drain, sewer, or aqueduct, along the side of any such highway, shall be liable to a fine not exceeding Rs. 50; and the Magistrate shall have power to remove any such obstruction or encroachment, and the expense of such removal shall be paid by the person erecting the same, and shall be recoverable from him in the manner provided in s. 83 of this Act."

If the whole of this clause is to be read as one single provision, and the power of the Magistrate to remove an obstruction only exists where the person building or setting up the obstruction has been convicted and punished by a fine, it might be said that the conviction of setting up the obstruction and imposition of the fine and the removal of the obstruction being one act, and the order by the Magistrate that it should be removed being part of the judicial proceeding for punishing the offender, the whole was a judicial act,—that the removing the obstruction could not be separated from the awarding the punishment of the fine. But it appears to me that this would not be a reasonable construction of the clause, for then it would not provide for the cases where it may be necessary for purposes of conservancy that the obstruction should be removed, and yet no person can be discovered who could be

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punished for setting it up and made liable to pay a fine, or from whom even the expense of the removal could be recovered. This clause, although it contains two provisions, one for the punishment of the author of the obstruction, and the other for the removal of the obstruction, must be looked at as if it was in fact two clauses ; one providing for the judicial act of determining who the offender is and punishing him, and the other for what may be done separately and without any offender being punished, namely, the act of removing the obstruction, which may properly be called an executive or ministerial act.

In other parts of the schedule also we find clauses, some of which relate to judicial acts, namely, powers of fining for offences. For instance, there is the 3rd clause, where, if a person being ordered to remove a projection, encroachment or obstruction does not do so, he shall be liable to a fine not exceeding Rs. 50, and the Magistrate in such a case may remove or alter the projection, encroachment or obstruction. Others are, cl. 8, where if a person neglects or refuses, after notice from the Magistrate, to keep a drain, privy or cesspool in a proper state, he shall be liable to a fine ; and the 9th clause, where the fouling of water by bathing, washing, throwing rubbish, &c., is made punishable by a fine. Then there are powers which are not judicial, as in the 10th clause, which gives to the Magistrate the power of filling up unwholesome tanks in private premises, and provides in the same way as the 1st clause that the expense incurred thereby shall be paid by the occupier of such premises, and shall be recoverable from him in the manner provided in s. 83 of the Act ; and the 11th, which gives the Magistrate power to clear noxious vegetation and improve bad drainage ; and the 12th, which gives him power to drain off and clean stagnant pools in open places ; and the 13th, which gives him power to cause places near public highways which are dangerous to passengers to be repaired, protected, and enclosed.

Here are various acts which may be done by a Magistrate by virtue of this schedule, which are not judicial. They are ministerial acts, and acts which may in some cases be done by virtue of the Act by persons who are not Magistrates, namely

the Town Committee. They in no way partake of the nature of a judicial proceeding.

It seems to me that the schedule to the Act gives power to the Magistrate for purposes of conservancy to do things which are merely ministerial. It also gives him power in certain cases to punish an offender by a fine. But these are distinct acts, and the circumstance, that in this instance there has been the imposition of a fine upon the person who is said to have set up the obstruction, does not make the act of the Magistrate which followed it, the act of removing the obstruction, in any way a judicial act. It does not protect him from an action being brought, not to try the legality of his decision in punishing the offender by a fine, and not to interfere with that, but to try the question of right whether the person to whom the place belongs has a right to have the steps there or not. I cannot construe this Act as being intended to put in the power of the Magistrate acting as a conservancy authority the decision of questions of property which might be of the utmost importance to persons : and to do so without there being any appeal from his decision : for I cannot regard the provisions of s. 92, which seems in one stage of this suit to have been relied upon as protecting the magistrate from an action, as being in any way whatever a remedy by appeal. It seems to me to have been intended for quite a different purpose.

I think, therefore, that Markby, J.'s decision that the action was not barred either by Act XVIII of 1850 or by the general law, is a right one, and that this appeal ought to be dismissed with costs.

JACKSON, J.—I entirely concur in the judgment which has been just delivered, and have very little to add. I can only say that it seems to me that it would be matter of the most serious consequence if Magistrates, in addition to being protected in the discharge of their purely judicial functions, were also so far inviolable in their executive capacity, that they should be at liberty to make orders in the conservancy branch of their duties which should not be liable to question in any form or shape. It would be simply placing property in towns, where such Acts come

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into operation, absolutely at the disposal of the Magistrate for the time being. The section referred to by the learned Chief Justice is manifestly one, I think, intended to give the Government and the Commissioner the power of controlling in an executive way the proceedings of the Magistrate under the Act, and, it would be, if it could be used at all for such a purpose, a very inadequate substitute for that right which every subject ought to have of submitting questions of this kind to the decision of the Civil Courts.

Appeal dismissed.

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P. C.*
 1874
 Nov. 6.

HURSAHAI SINGH AND OTHERS (PLAINTIFFS) v. SYUD LOOTF ALI KHAN AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Accretion—Lands Temporarily or Permanently Settled—Reformation.

Where lands submerged by a river reform, and can be identified as having formed a part of a particular estate, they belong to the owner of that estate, whether his estate consists wholly of permanently settled lands, or whether it has been partly acquired as an alluvial accretion under temporary settlements made by Government with him as owner of permanently settled lands.

Appeal from a judgment and decree of the High Court at Calcutta, bearing date the 4th June 1866, affirming a judgment and decree of the Judge of Patna, dated the 20th September 1865.

The plaintiffs, the owners of the estate of Muteor, a portion of which estate they held under temporary settlements with Government, claimed certain lands as having reformed on the site of a part of their estate which had been diluviated by the Ganges. The defendants, on the other hand, claimed the same lands as an accretion, under Regulation XI of 1825, to their estate of Ramnuggur. The Judge of the Patna Court, by whom the case was tried, found on the facts that although the lands in question, when they first formed and rose clear of the river, were attached to the estate of Ramnuggur, they could nevertheless be clearly

* Present :—SIR J. W. COLVILLE, SIR B. PRACOCK, SIR M. E. SMITH, R. SIR P. COLLIER, AND SIR L. PEEL,

identified as having reformed on a portion of the Mutteor estate which had been submerged. Applying the law, as it had been declared by a Division Bench of the High Court in the case of *Romanath Thakoor v. Chundernarain Chowdhry* (1), the Judge awarded the lands to the plaintiffs. On appeal to the High Court his decision was held to be opposed to the judgment of a Full Bench of that Court in the case of *Kattemoness Dossee v. Ranees Monmohinee Dabee* (2), in which the view taken in the case of *Romanath Thakoor* had been overruled. The case was accordingly remanded to the Judge of the Patna Court to decide it in accordance with the principles laid down in the Full Bench Ruling. In compliance with these instructions the District Judge, without altering his finding on the facts, held that the lands were to be taken to have formed as an accretion to Ramnuggur, and awarded them to the owners of that estate. This judgment was affirmed by the High Court on appeal. From that decision the plaintiffs appealed to Her Majesty in Council.

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Mr. Doyne for the appellants.—The first decision of the District Judge was correct. The facts found by him bring the case within the decision of the Privy Council in *Lopez v. Maddan Thakoor* (3). That decision supports the view taken by the Division Bench in *Romanath Thakoor v. Chundernarain Chowdhry* (1), and is opposed to the ruling of the Full Bench in *Kattemoness Dossee v. Ranees Monmohinee Dabee* (2). The earlier case of *Mussamut Imam Bandi v. Hurgovind Ghose* (4) was to the same effect as the judgment in the case of *Lopez v. Maddan Thakoor* (3) and these decisions have been followed in *Nogender Chander Ghose v. Mahomed Esaf* (5).

Mr. Leith, Q.C., for the respondents.—If the facts must be taken as found by the District Judge, the decision in the case of *Lopez v. Maddan Thakoor* will govern so much of the present claim as relates to the land which has reformed on the site of the

(1) Marsh. Rep., 136.

(4) 4 Moore's I. A., 403.

(2) 3 W. R., 51.

(5) 10 B. L. R., 406.

(3) 13 Moore's I. A., 467; S. C., 5

B. L. R., 521.

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appellant's permanently settled estate. But neither that decision nor any other of the decisions which have been cited, applies to the appellant's claim to the land which has reformed on that portion of his estate which he holds under temporary settlements with Government.

[Mr. Leith was about to enter on an examination of the evidence with the object of shewing that the finding of facts by the Judge of the Patna Court was erroneous. But their Lordships intimated that, as that finding had been accepted in the Courts below without objection, it would be almost impossible to impugn it successfully at that stage of the case.]

The judgment of their LORDSHIPS was pronounced as follows by

SIR M. E. SMITH.—Their Lordships, considering the turn that the argument has taken, do not think it necessary to go at any length into this case. The suit was brought by the appellants, the proprietors of Mouza Muteor, in Tirhoot, against the respondents, the proprietors of Mouza Ramnuggur, to recover the possession of a large quantity of land which had been submerged by the River Ganges. It appears that the river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at time the river over flowed, and formed a pool or lake. The land which is the subject of the present suit was submerged, and when it first became free from water, and reappeared, it adhered to and adjoined the estate of Ramnuggur, and, *prima facie*, the accretion was to that estate, but upon an inquiry made by the Judge of Patna, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had reformed close to Mouza Ramnuggur, was, in point of fact, land which belonged to Mouza Muteor, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that Mouza. He found those facts, and applying the law as he understood it

to the facts, namely, that when submerged land can be identified upon its reappearance as belonging to a particular estate, the proprietor of that estate is entitled to it, because in truth he had never lost the land, the land was always his, and the difficulty of identification being removed by evidence—the land being in fact identified—there was no reason why the property should not be regained by him. He acted upon this principle of law, which had been at that time affirmed by the High Court of Calcutta in a case in which Sir Barnes Peacock, with two other Judges, had given the judgment. That, however was the judgment of a Division Bench; and the High Court, upon appeal in the present suit, decided that they were bound by a subsequent decision of a Full Bench of the High Court, which had come to a contrary conclusion, and had held that land which reappeared under circumstances like the present, must be held to belong to the proprietor of the estate to which it had apparently accreted; and they remanded the cause to the Judge of Patna, who, without altering his finding on the facts, decided according to this view of the law, and his judgment was, as might be expected, upheld by the High Court, in the judgment now under appeal, on the case again coming before it upon the appeal of the present appellants.

The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopez v. Maddan Thakoor* (1), in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged reforms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it. It is admitted by Mr. Leith, the Counsel for the respondents, that the authority of this case, and others which have followed it before this Committee, cannot be disputed. Their Lordships think the principles laid down in those cases are perfectly correct, and are distinctly applicable to the present; and that, if the facts are to be taken as they were

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(1) 13 Moore's I. A., 467; S. C., 5 B. L. R., 521.

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found by Ainslie, J., the judgment below must be reversed. Their Lordships, for the reasons they gave during the argument, think it is impossible those facts could be disputed with any effect at their bar, and therefore both law and fact are in favor of the appellants.

Mr. Leith endeavoured to distinguish between the lands which were the permanently settled lands of Muteor and some lands which had been in themselves an accretion, and which were temporarily settled only with the proprietor of Muteor. Their Lordships think, however that this distinction cannot prevail. There is evidence from which it may be presumed that those lands accreted to the estate of Muteor, and it may be inferred from the mode of accretion that the Government settled with the proprietor upon the ground that they had so accreted, and therefore that he was entitled to the settlement.

On these grounds their Lordships think that the judgment of the High Court must be reversed, and they also think that the decree originally made by the Judge of Patna before the remand is the correct decree. They find there is no formal petition of appeal against the decree of the High Court which remanded the suit, but this judgment ought not to be allowed to stand in the way of the proper decree to be made in the cause, and will be nullified by the course their Lordships propose to take *viz.*, humbly to advise Her Majesty to reverse the judgment of the High Court now under appeal, and the second judgment of the Zilla Judge, and to direct a decree to be made in the suit to the effect of the original decree of the Zilla Judge. The respondents must pay the costs of the litigation in India, and of this appeal.

Appeal allowed.

Agent for appellants, *T. L. Wilson.*

Agent for respondents, *J. H. & H. R. Henderson.*

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonell.

MOHESH CHUNDER ROY AND OTHERS (DEFENDANTS) v. CHUNDER
MOHUN ROY AND OTHERS (PLAINTIFFS).*

1874
Aug. 4.

Hindu Law—Blindness—Exclusion from Inheritance—Dayabhaga.

The blindness which, under the Hindu law as recognized in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness and not to loss of sight which has supervened after birth.

The plaintiff Chunder Mohun Roy, a Hindu subject to the Hindu law current in Bengal, sued to recover possession of a share in certain property which he claimed by right of inheritance. The plaint alleged that the property in dispute belonged originally to one Amrit Sing Roy, the younger brother of the paternal grandfather of the defendants and of Chunder Mohun Roy; that Amrit Sing Roy died, leaving him surviving a minor son, named Issan Chunder Roy, and a widow named Karoonamoyee; that Issan Chunder Roy died a minor during the lifetime of his mother Karoonamoyee, who succeeded to his estate as a life-tenant; and that Karoonamoyee died on the 10th of Bhadon 1275.

The other plaintiffs were purchasers of certain interests from Chunder Mohun Roy.

The defendants pleaded *inter alia* that Chunder Mohun Roy had become blind previous to the death of Karoonamoyee, when the inheritance opened out to him, and that he was, therefore, incapable of inheriting by Hindu law.

The Subordinate Judge considered it to be doubtful on the evidence when Chunder Mohun became blind. He found, however, that the blindness was not proved to be incurable, and accordingly decreed in the plaintiffs' favor.

*Special Appeal, No. 678 of 1874, against a decree of the Officiating Judge of Zilla Dacca, dated the 16th December 1873, affirming a decree of the Officiating Subordinate Judge of that District, dated the 16th September 1872.

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On appeal by the defendants, the Judge expressed the opinion that, with the exception of a gloss of Jagannatha's to which he attached but little weight, there was nothing in the Hindu authorities to show that blindness, to operate as a cause of exclusion from inheritance, must be incurable, but that the real test appeared to be was or was not the blindness congenital. In the present case he found as a fact, that Chunder Mohun became blind in Karoonamoyee's lifetime, and he accordingly held that as he had not been born blind he was not excluded from the inheritance.

The defendants appealed to the High Court.

Mr. C. Jackson (*Baboos Gopal Chunder Sircar and Sreenath Banerjee with him*) for the appellants

Baboos Mohini Mohun Roy and Nullit Chunder Sen for the respondents.

The authorities cited in the arguments appear in the judgment of the Court, which was delivered by

JACKSON, J.—The question raised in this special appeal is whether the plaintiff, Chunder Mohun Roy, is excluded from his share of inheritance by reason of his having become blind at a period of about two years before the succession opened. The Subordinate Judge, in whose Court the suit was brought, and the District Judge who heard the appeal, both decided that the plaintiff is not excluded by the Hindu law, and the object of this special appeal is to show that the Hindu law current in Bengal does exclude a person under such circumstances. In a matter of this sort, it appears to us that the case should be ordinarily concluded by the authority of the text-books which are regarded as the first authority in Bengal, and first of all those books undeniably is the *Dayabhaga*. The *Dayabhaga* in Ch. v, which is devoted to that subject, sets out in paras. 1 to 9 the persons who are excluded from various causes. In para. 10 the enumeration is repeated, and in that paragraph and para. 11. the right of such persons to maintenance is insisted upon. The enumeration which

the Dyabлага contains is in these words:—"Impotent persons and outcasts are excluded from a share of the heritage, and so are persons born blind and deaf, as well as madmen, idiots, the dumb, and those who have lost a sense [or a limb]," the translation being alternative. That phrase seems clearly to indicate the meaning of the author who quotes it, that the exclusion refers to persons born blind and deaf, not to persons who afterwards become blind by accident. The enumeration in para. 10 has not for its object any variation of the list of persons mentioned above; but the blind man is mentioned as a person who though excluded must be maintained. do I not think the intention was to refer to the blind man in any other sense than he is referred to by Menu:

The next authority, which is not denied, is the Dayakrama Sangraha, and the author of that work is even more explicit on the subject. He in Ch. iii, paras. 1 and 2, mentions, expressly persons "born blind and deaf, that is by nature, not those who have become so from some adventitious cause." He says:—"The meaning therefore is, those who are blind and deaf from the period of their birth." As far, therefore, as these authorities are concerned, the decisions of the Courts below appear to be in conformity with the Hindu law. But it is said that going further back, and looking to the original source of the Hindu law, viz., the original text of Menu, we ought to put a strict interpretation on that law. The phrase referred to is Ch. ix, sloka 201 (1). That is in these words:—"Eunuchs and outcasts, persons born blind, or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage." Now if it be contended that by the expression "such as have lost the use of a limb," the exclusion is carried beyond what is implied in the former part of the sloka, it must be clear that the person to be excluded must be incurably blind or such as has lost the sense of sight. Here the evidence does not show anything of that sort. The plaintiff has not lost his eyes, nor is there anything, as I understand, to show that he is incurably blind. Therefore, if we are to go on

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that sloka, I do not think he would be necessarily excluded. Speaking for myself, I should rather base my judgment on the two authorities on the Hindu law as are current in Bengal—I mean the *Dayabhaga* and the *Dayakrama Sangraha*. A rule of Hindu law, which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable. I think, therefore, that this special appeal must be dismissed with costs,

Appeal dismissed.

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MUTTY LALL MOOKERJEE AND OTHERS (PLAINTIFFS).

P. C.*
1874
Nov. 5,

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Sale, Validity of—Purchase by Executor—Fiduciary Relationship—Trustee and Cestui que Trust—Suit for Administration—Subsequent Suit against Purchaser to set aside Sale.

D, a Hindu, died leaving three sons *S*, *S C*, and *R*, who on his death made a partition of his estate, and *S* covenanted with *S C* to discharge all claims made against the estate of *D*. In 1828, *B* who claimed a portion of the share taken by *S C* on partition with mesne profits, filed a bill in the Supreme Court against *S C* and others as representatives of *D*, and obtained a decree for Rs. 2,00,000. Pending this litigation *S C* died, leaving six sons, *J*, *M*, *H*, *P*, *O*, and *S M*, and a will made before the birth of *S M*, by which he left all his property to his sons other than *S M*. On the death of *S C*, *J*, as one of the executors of his will, compromised *B*'s suit so far as it related to the estate of *S C*, for Rs. 80,000; and afterwards, in the same capacity, sued the representatives of *S* to recover that amount and the costs in the suit brought by *B*, and obtained a decree for Rs. 1,70,000. In the meantime *H* died leaving the plaintiffs his sons and heirs, and his brothers *J* and *M*, his executors. *J* renounced the executorship. *M*, on 3rd June 1854, as executor of *H*, executed a deed of assignment, by which he conveyed to *J* and *S M*, for Rs. 5000, the interest of the plaintiffs in the decree obtained by *J* and subsequently at a sale of property belonging to the representatives of *S* in execution of the decree, *J* himself became the purchaser. In 1857, in an administration suit, which had been brought by the plaintiffs to compel *M* to account for the assets received by him from the estate of *H*, the Master was directed to take an account, which was accordingly done. In a suit brought by the plaintiffs, the

* *Present* :—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,
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sons of *H.*, against *J.*, *M.*, and *S. M.*, to set aside the deed of 3rd June 1854,—
Held, that notwithstanding the renunciation of executorship by *J.*, he stood
 in a fiduciary relation to the plaintiffs, and the assignment being found to
 have been made for an inadequate consideration, was ordered to be set aside
 on the plaintiffs paying the purchaser, *J.*, the amount of the purchase-money.

A decree in an administration suit brought by the parties whose interest had
 been sold against the executor of their father's will, by whom the sale had been
 made, held to be no bar to the maintenance of a suit against the purchaser
 to have the sale set aside.

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APPEAL from a decree of the High Court of 'Judica-
 ture at Fort William in Bengal dated the 7th December 1864,
 confirming a decree of the same Court in its original juris-
 diction, dated the 21st December 1863.

The circumstances under which the litigation arose were the
 following :—

Doorga Churn Mookerjee, a wealthy Hindu, died in Calcutta
 in the year 1814. On his death his three sons, Sib Chunder,
 Sumboo Chunder, and Ramnarain, made partition of his estate.

Under the arrangement for the partition a certain zemindari,
 Pergunna Mooloye, was taken by Sumboo Chunder as a part
 of his share, and Sib Chunder covenanted with Sumboo Chunder
 to discharge all claims against the estate of Doorga Churn,
 their deceased father.

In the year 1828, a bill was filed in the Supreme Court
 against Sumboo Chunder and others, as representatives of
 Doorga Churn, by Raja Baroda Kant Roy, whose ancestors
 had been the owners of the Pergunna Mooloye, charging that
 Doorga Churn had caused the said zemindari to be sold, while
 he, the Raja, was an infant; praying to have the sale set aside,
 and claiming mesne profits. In this suit a decree was made
 against the representatives of Doorga Churn for about two
 lakhs of rupees.

While this litigation was pending, Sumboo Chunder died,
 leaving six sons, Juggut Chunder, Mohesh Chunder, Hurrish
 Chunder, Pran Chunder, Cally Chunder, and Sreeman Chunder.
 Before his death and before the birth of his son Sreeman
 Chunder, he made a will, by which he left all his property to
 his other five sons.

On Sumboo Chunder's death, Juggut Chunder, as one of his

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executors, compromised the suit of Raja Baroda Kant Roy, so far as related to the estate of Sumbho Chunder, for a sum of Rs. 80,000, and afterwards, still acting as his father's executor, sued the representatives of Sib Chunder to recover that sum together with the costs incurred in the litigation with Raja Baroda Kant. In this suit he had a decree for Rs. 1,70,000.

Hurrish Chunder Mookerjee, in the meanwhile died, leaving his sons Mutty Lall and Beharry Lall his heirs, and his brothers Juggut Chunder and Mohesh Chunder his executors. Juggut Chunder renounced the executorship, but Mohesh Chunder accepted, and as executor of Hurrish Chunder, by a deed of assignment dated the 3rd June 1854, made over for a sum of Rs. 5,000 to Juggut Chunder and Sreeman Chunder the interest of the heirs of Hurrish Chunder in the decree for Rs. 1,70,000.

Subsequently to the date of this assignment, at a sale by the Sheriff of Calcutta of property belonging to Sib Chunder's representatives in execution of the said decree, Juggut Chunder himself became a purchaser, the price of the property which he bought being credited to the decree. Portions of the property thus purchased by Juggut Chunder were afterwards sold by him for a much higher price than he had paid for them.

In September 1857 an administration summons was taken out by Mutty Lall and Beharry Lall against Mohesh Chunder to account for the moneys which he had received as executor of the will of Hurrish Chunder. In the petition filed to obtain that summons it was set forth that Mohesh Chunder, as executor of the will of Hurrish Chunder, "had relinquished all claims to the decree for Rs. 1,70,000, by executing the said deed of assignment for the sum of Company's Rs. 5,000 only, and thereby had occasioned a loss to the plaintiffs of the balance of Company's Rs. 23,333." The order passed in the Supreme Court on this petition merely directed the Master to take an account of the assets which Mohesh Chunder had received. This the Master accordingly did, and found that there was a small balance due to the estate.

On the 30th December 1861, Mutty Lall and Beharry Lall filed a bill of complaint in the Supreme Court against Juggut Chunder, Mohesh Chunder, and Sreeman Chunder Mookerjee.

Juggut Chunder died shortly after the institution of the suit, but the suit was revived against his executors Dhonender Chunder, Jadab Chunder, and Ghunnesseyam.

In this suit it was prayed :—

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1st.—That the deed of assignment, dated the 23rd June 1854, of the plaintiffs' shares and interest in the decree, obtained by Juggut Chunder against Sib Chunder Mookerjee's representatives, for the sum of Rs. 5,000, might be declared as against them, the plaintiffs, invalid and void as an absolute conveyance, and that the said assignment might be decreed to stand as a security only for the said sum of Rs. 5,000, and for anything further which might be found to be justly due from the plaintiffs to the defendants.

2nd.—That the property purchased by Juggut Chunder at the Sheriff's sale in execution of the said decree should be declared to have been purchased by him with the money, and on account, of the plaintiffs, and if it should appear that Sreeman Chunder was interested in such purchase, that he was bound by the trusts for the plaintiffs thereby created.

3rd.—That it might be declared that Juggut Chunder and Sreeman Chunder held a sixth part of the balance of the said decree, so far as the same remained unsatisfied, and of the property which they had bought under that decree, and which remained unsold, and of the sums which they might have realized by the sale of any portion thereof, in trust for the plaintiffs.

4th.—That the plaintiffs might be let in to redeem their one-sixth share of such property remaining unsold on payment of the said sum of Rs. 5,000, and of any thing further which might be found due to the defendants on taking accounts.

On the hearing of the case, on the 21st December 1863, the Court held that the defendant Juggut Chunder stood in a fiduciary position with reference to the plaintiffs, and that he had purchased their share in the decree for an inadequate consideration. The plaintiffs accordingly had a decree in the terms sought by their bill, which was affirmed on appeal to the Court in its appellate jurisdiction on the 7th September 1864 (1).

The defendants, with the exception of Mahesh Chunder Mookerjee, appealed from this decision to Her Majesty in Council.

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Mr. T. H. Cowie, Q.C., and Mr. J. Cochrane, for the appellants, contended that no fiduciary relation subsisted between Juggut Chunder and the respondents Mutty Lall and Beharry Lall at the date of his purchase of their interest from Mohesh Chunder as executor under the will of Hurrish Chunder. Juggut himself had renounced the executorship of that will; he had never acted in execution of it, or otherwise accepted its trusts.

The Courts below were wrong in finding that adequate consideration had not been paid for the purchase. At the time when the transaction took place, the decree which Juggut had obtained against the representatives of Sib Chunder was impeached on the ground that it had been fraudulently obtained: a large part of the property which had belonged to Sib Chunder was then in the hands of adverse claimants, and it was doubtful whether, even if the decree could be upheld, any part of it could be realized. Under such circumstances the purchase was a mere speculation in a matter likely to involve extensive litigation, with heavy costs, and a doubtful issue. In this view the price given was not inadequate.

The respondents Mutty Lall and Beharry Lall were of age at the date of the assignment in 1854. They did not, however, bring their suit till 1861. They had not consequently used reasonable diligence in impeaching the assignment, and could not claim the aid of a Court of Equity.

An administration suit had already been brought against Mohesh Chunder as the only executor who had acted under the will of Hurrish Chunder, and in that suit Mohesh had accounted, and the assets had been duly administered. The present suit was in the nature of a bill of review of the decree in the administration suit, or it was in the nature of a supplemental bill, or a bill in aid of that decree, and could not therefore be maintained. The decree obtained by Mutty Lall and Beharry Lall against Mohesh in the administration suit was a bar to the present suit in which Mohesh and Juggut were both made defendants.

In support of the last two contentions, Mr. Cochrane cited the following cases:—*Harvey v. Bradley* (1), *Green v. Badley* (2),

(1) L. R., 4 Eq., 13.

(2) 7 Beav., 274.

Hodson v. Ball (1), *Partington v. Reynolds* (2), *Sheffield v. Dutches of Buckinghamshire* (3), *Blake v. Foster* (4), *Bingham v. Dawson* (5), *Bank of Australasia v. Nias* (6), *King v. Hoare* (7), *Henderson v. Henderson* (8), *Tomney v. White* (9), *Garland v. Littlewood* (10).

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The respondents did not appear.

The judgment of their LORDSHIPS was delivered as follows by

SIR BARNES PEACOCK :—This was a suit instituted by the sons of Hurriish Chunder against Juggut Chunder and Sreeman Chunder Mookerjee, praying, amongst other things, that a certain deed of assignment, dated the 23rd of June 1854, of the plaintiffs' shares and interest in a certain decree, which had been sold by Mohesh Chunder Mookerjee to Juggut Chunder Mookerjee, might be declared as against them invalid and void as an absolute conveyance, "and that the said assignment might be decreed to stand as a security only for the sum of Rs. 5,000, and for anything further which might be found justly due from the plaintiffs to the defendants." Mohesh Chunder Mookerjee was made a party to the suit, but no relief was prayed against him. The ground upon which the bill was framed was, that Juggut Chunder, who purchased the decree, stood in a fiduciary relation to the plaintiffs, and that he had purchased the decree for an inadequate consideration. It appears that Doorga Churn Mookerjee was the father of Sib Chunder, Sumboo Chunder, and Ramnarain; that Doorga Churn Mookerjee was possessed of considerable property, and having died, his three sons divided the estate. Sumboo Chunder took a portion of the estate, and Sib Chunder covenanted with Sumboo Chunder to discharge all claims against the estate of Doorga Churn. A claim was made against Sumboo Chunder and others, as repre-

(1) 1 Ph., 177.

(2) 4 Drew, 253.

(3) 1 Atk., 628.

(4) 2 Ball & Beatty, 461.

(5) Jac., 243.

(6) 16 Q. B., 717.

(7) 13 M. & W., 494.

(8) 3 Hare, 100.

(9) 6 Cl. & Fin., 786.

(10) 1 Beav., 527.

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representatives of Doorga Churn, and a decree was obtained against them for about two lakhs of rupees. Sumboo having died, Juggut, as one of his executors, compromised the suit for Rs. 80,000, and, as such executor, brought a suit against the representatives of Sib Chunder to recover that amount and other moneys from his estate; and in that suit he obtained a decree for Rs. 1,70,000. That suit was brought by Juggut Chunder as the executor of Sumboo Chunder. The question is whether, in that position, and in that character, he did not hold a fiduciary relation to the plaintiffs in the suit. Sumboo Chunder died, leaving six sons, Juggut Chunder, who is the defendant in this suit, Mohesh Chunder, who is also made a party to this suit, Hurrish Chunder, Pran Chunder, Cally Chunder, and Sreeman Chunder; but Sumboo Chunder, before he died, made a will, by which he left his property to his five sons. Sreeman Chunder was not then born.

Hurrish Chunder died, leaving the plaintiffs in the suit his heirs, and consequently Juggut Chunder held the decree which he recovered against the representatives of Sib Chunder in trust for the benefit of himself and his brothers, and as to the share of his brother Hurrish Chunder for the benefit of the plaintiffs. Hurrish Chunder appointed Juggut Chunder and Mohesh Chunder his executors; and Mohesh Chunder, as one of the executors of Hurrish Chunder, sold the interest of Hurrish Chunder's sons to Juggut Chunder for the sum of Rs. 5,000; in other words, he sold a fifth share of a decree for Rs. 1,70,000 for Rs. 5,000. The Courts found that that was under-value, and that an inadequate consideration was given by Juggut Chunder to Mohesh Chunder for the purchase. It is said that Juggut Chunder, as one of the representatives of Hurrish Chunder, renounced. Whether he did so renounce, or could renounce, appears to be immaterial, provided he held in a fiduciary character, as executor of Sumboo Chunder, the share which belonged to the plaintiffs as the sons of Hurrish Chunder. It is clear that he held the decree which he recovered as executor of Sumboo in trust as to a share for the benefit of the plaintiffs who were the sons of his brother Hurrish.

Now both Courts have found that no adequate consideration

was given for the purchase. It therefore appears that there was a sale of the interest of the plaintiffs for an insufficient consideration to Juggut Chunder, who held in a fiduciary character for them. According to the rules of equity, that sale cannot stand as an absolute sale, but Juggut Chunder is bound to return the share of the plaintiffs in that estate upon receiving back the purchase-money which he gave for it.

The youngest son of Sumboo, Sreeman Chunder, was also made a defendant in the suit. Sreeman Chunder is said to have been a party to the purchase by Juggut Chunder. He says that Juggut Chunder purchased the decree for the benefit of himself and Sreeman Chunder jointly. But if Juggut Chunder, holding the decree in a fiduciary position, could not purchase it for himself, could Sreeman Chunder employ Juggut Chunder, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and Sreeman Chunder jointly? It appears to their Lordships that the same objection would apply to Juggut Chunder's purchasing for himself and Sreeman jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this is that the purchaser is presumed, from his position, to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person, knowing that another holds a fiduciary position and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself; therefore it was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against Juggut Chunder, and to allow it to stand as to the other half for the benefit of Sreeman Chunder. If it became necessary to investigate the evidence, there does not seem to be sufficient to show that Sreeman Chunder actually advanced any part of the purchase-money, or was really interested in the purchase.

The decree having been obtained by Juggut Chunder, the property of Sib Chunder's representatives was put up for sale by

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the Sheriff in execution, and a portion of the property so put up was purchased under the decree, but Juggut Chunder did not actually pay money for the property which he so purchased. The price of that portion of the property which was sold in execution of the decree was credited to the decree, and only the balance remained due. Then Juggut Chunder held the balance of the decree, and also the property which he had purchased and paid for with the other portion of the decree, in trust as to one-fifth share for the benefit of the plaintiffs. It was shown that Juggut Chunder resold portions of the property which he purchased at the sale under the decree for very much larger sums of money than those for which he purchased them. Both the lower Courts found, as a fact, that the Rs. 5,000 which Juggut Chunder paid as the purchase-money of the share of the plaintiffs was an inadequate consideration. Their Lordships would not disturb the finding on the question of value unless there was the clearest evidence to satisfy them that an adequate consideration was given for the property; but, so far from that appearing to be the case, their Lordships are satisfied that the Lower Courts came to a right conclusion in finding that there was an inadequate consideration.

Then it is contended that this suit cannot be maintained, inasmuch as a suit had been brought against Moresh Chunder, as one of the executors of Hurrish Chunder, for administration of the assets of his estate: and it is said that this suit is in the nature of a bill of review of the decree which was given in that suit, or that it is in the nature of a supplemental bill, or of a bill in aid of that decree. But it appears to their Lordships most clearly that that is not so, when they come to look at the nature of the two suits. The administration summons, which may be treated as a suit, was to compel Moresh Chunder to account for the moneys which he had received as executor of Hurrish Chunder. It is true that in the affidavit, and also in the petition which was filed in order to obtain that summons, it was alleged that Moresh Chunder, as the executor of the will of Hurrish Chunder, "had relinquished all claims to the decree for Rs. 1,70,000, by executing the said deed of assignment for the sum of Company's Rs. 5,000 only, and thereby had occa-

signed *M. & Co.* to the plaintiffs of the balance of Company's Rs. 28,333.2. That was alleged in the petition; but it is clear that under a summons for an administration of the assets of an estate the executor could not be charged with negligence and wilful default. Accordingly the order which was made under that petition, referring the matter to the Master, did not direct the Master to inquire as to whether more could have been made by Mohesh Chunder if he had not been guilty of wilful default, but merely to take an account of the assets which he had received; and that is all that the Master did. He found what Mohesh Chunder had received, and stated that there was a small balance due from him to the estate; but he did not enter at all into the question of whether Mohesh Chunder had committed waste; nor could he, under the order which was made by the Court, have entered into that question. When the matter was brought before the first Court, Morgan, J., says, "One point made by the defendants is that the same points have been raised by an administration summons by the present plaintiffs against the executor. The Master, however, properly declined to enter on an investigation of this matter;" and the Master never did, nor did Lvinge, J., who made the order, direct the Master to enter into such an investigation. He could not, and did not, make such an order, and the matter never came before the Master at all.

Well, then, assuming that Mohesh Chunder has been decreed to account for the Rs. 5,000 which he had received from Juggut as the purchase-money of the estate, that circumstance would be no reason why the heirs of Hurrish Chunder should not have the purchase made by Juggut Chunder set aside upon returning the amount to him. The two causes of action are quite different. The present suit is not in the nature of a review of the decree which has been made against Mohesh Chunder. It is a suit against Juggut Chunder as a purchaser in his own right and not as executor of Hurrish Chunder. The other suit was against Mohesh Chunder, to account for what he had received as executor of Hurrish Chunder.

It appears, therefore, to their Lordships, that the lower Court was right in declaring that the points raised by the administra-

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tion summons, and the order and the reference to the Master, did not preclude the plaintiffs from bringing this suit against Juggut Chander. It is true that Mohesh Chander was made a party to the present suit, but whether it was necessary or not is immaterial. Possibly this decree might have been obtained against Juggut Chander without making Mohesh a party; but Mohesh did not object to being made a party, and he does not appeal in this case. He is made a respondent in this suit; he is not an appellant.

Their Lordships do not repudiate the authority of any of the cases which were cited by Mr. Cochrane. Admitting them to their fullest extent they are not applicable to the present case.

Norman, J., says, "I see no reason why an account should not be taken against one executor on one principle and against another in respect of a separate wrong committed by him or separate relief sought against him." It appears to their Lordships that that remark is not applicable to the case. They have already pointed out that this is not a suit against Juggut Chander as executor of Hurriah Chander, nor for a wrong committed by him in that capacity. The relief to which the plaintiffs are entitled is upon the ground that the purchase which Juggut Chander made was invalid, not because he was executor of Hurriah Chander, but because he was executor of Sumboo Chander, and as such executor held, for the benefit of Hurriah Chander's heirs, the share which he purchased from Mohesh Chander as executor of Hurriah Chander.

Under these circumstances their Lordships think that the lower Courts came to a right decision, and they will therefore humbly recommend Her Majesty that the decree of the High Court be affirmed. As there is no party appearing on the other side, it will be without costs.

Appeal dismissed.

Agents for the appellant: Messrs. Robinson and Preston.

APPELLATE CIVIL.

*Before Sir Richard Couch, Kt., Chief, Justice, and Mr. Justice Jackson.*1874
March 11.**DINGNATH SEN (JUDGMENT-DEBTOR) v. GURUCHURN
PAL (DECREE-HOLDER).****Kistbandi—Execution.*

Where a decree had been obtained for a certain sum of money without interest, and afterwards a kistbandi was filed, by which the decree-holder and the judgment-debtor agreed that the amount of the decree should be paid by instalments with interest, and the judgment-debtor had, by his conduct for several years, treated the kistbandi as if it were a decree;—*Held*, that, under the circumstances of the case, the judgment-debtor could not afterwards object that the kistbandi could not be executed as a decree, and that a fresh suit should be brought upon the kistbandi; but the decree-holder was entitled to take proceedings on the kistbandi as if it were part of the original decree.

THE respondent in this case obtained a decree on the 1st of July 1863 for a certain sum of money without interest. Afterwards, by a kistbandi dated the 3rd of July 1864, it was agreed between him and the appellant, the judgment-debtor, that the amount of the decree should be paid by instalments with interest. It appeared that an application was made for execution of the decree on the 8th of May 1866, and notice was accordingly served. That application was struck off, and on the 4th of December 1866, another application was made, and some property of the judgment-debtor was attached and advertized for sale. The judgment-debtor made a part-payment, which was certified to the Court by an application, dated the 7th of March 1867, on the part of the judgment-debtor, who also asked that the money should be applied towards the satisfaction of the terms of payment in the kistbandi. On the 29th of January 1870, another instalment becoming due, the decree-holder took out execution and attached some property, when the debtor made an appli-

*Miscellaneous Special, No. 390 of 1873, against an order of the Officiating Judge of Zilla Dacca, dated the 30th August 1873, affirming an order of the Additional Subordinate Judge of that District, dated the 11th June 1873.

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cation, which was assented to by the decree-holder, to have time to pay the amount due. The application was struck off on the 30th of May 1870, and the amount not having been paid as had been agreed, another application was made for the sale of the property on the 22nd of May 1871. The judgment-debtor objected to the sale, on the ground that a fresh attachment was necessary. The Subordinate Judge ruled that as the parties had asked the Court to credit the payment that had been made in satisfaction of the debt, and had treated the kistbandi as if it had become part of the decree, neither of them could object to an arrangement agreed to by both.

The Judge on appeal said that as the decree-holder had given up the right which he possessed of enforcing immediate payment by executing his decree when he obtained it, there was no reason why he should now be driven to bringing a new suit in order to recover interest. He accordingly dismissed the appeal.

Baboo *Kalimohun Doss* and *Kashikanth Sen* for the appellant.

The Advocate-General, offg. (Mr. Paul), (Baboo *Sreenath Doss* and *Bycant Nath Doss* with him) for the respondent.

Baboo *Kalimohun Doss*.—The kist bandi being subsequent to the decree in the case, and purporting to modify the effect of the decree, cannot be enforced as a decree. A suit may be brought to carry it into effect as intended—*Madhub Chunder Dundput v. Madhub Lall Khan* (1). No execution can be

(1) Before Mr. Justice Kemp and Mr. Justice Paul.

decree, which has not been incorporated with the decree.

MADHUB CHUNDER DUNDPUT
(DEFENDANT) v. MADHUB LALL
KHAN (PLAINTIFF).*

Baboo *Hemchander Banerjee* for the appellant.

Baboo *Terrachurn Sen* for the respondent.

The 22nd May 1871.

The judgment of the Court was delivered by

Kistbandi—Execution.

There is no procedure under Act VIII 1859, under which execution can be taken out upon a kistbandi, filed in Court after

PATR, J.—In this case it is quite clear that the Judge of the Court

* Special Appeal, No. 2477 of 1870, against a decree of the Subordinate Judge of Zilla Hooghly, dated the 30th August 1870, affirming a decree of the Muniff of Ghatal, dated the 31st March 1869.

allowed for a larger sum than the amount of the decree itself—

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below has not in any way attempted to carry out the order of remand, which very clearly directed him to try the additional issues raised by the supplementary plaint and the written statement put in in answer thereto. He has passed a judgment somewhat unintelligible, and wholly irrelevant to the question which he was directed to try; and we have in the appellate stage of the case to decide a question of law which was raised in the written statement to the supplementary plaint, and which up to this moment has not been in any way considered by the lower Appellate Court, so that the remand which was made virtually turns out unnecessary and infructuous.

The facts of this case are very shortly these. The plaintiff obtained against one Doorgamonee a decree on the 8th of July 1865. Doorgamonee was unable to pay off that decree and she executed a kistbandi for the money due under the decree, as well as for other sums of money due (but not under that decree) amounting to the sum of Rs. 180, to be paid off in twenty years' time, and pledged, amongst other properties, the property in dispute in this cause. The terms of the kistbandi not being observed, the plaintiff sued out execution under the kistbandi, put up the property in dispute to sale, purchased the same on the 3rd November 1867, and obtained a sale certificate on the 23rd January, 1868. In endeavouring to take possession of the property so purchased, he was opposed by the defendant whose title to the property is also derived under another decree, passed at or about the time of the

decree against Doorgamonee, under which execution was sued out, and the property in dispute purchased by the defendant on the 29th of March, 1867. The defendant raises two points against the plaintiff's claims; first that the plaintiff was not, according to law entitled to sue out execution under the kistbandi by which the property was pledged; and second, that if she were entitled so to do, the kistbandi itself was a collusive transaction, and that it was so, was so apparent on the face of the transaction that he proposed to examine the plaintiff with regard to it, but that his prayer to have the plaintiff examined was not heeded by the Courts below. With regard to the first point it is quite clear to us that where a kistbandi is not incorporated into a decree, and made part and parcel of a decree, there is no procedure under Act VIII amounting to a warrant of attorney under the English law, according to which execution may be taken out without first resorting to a regular suit, and consequently this attempt to take a short cut at a remedy which is only given under decrees must fail, and the first point which the defendant raises must be decided in his favor. As against this view, the pleader for the respondent has cited *Tarif Biswas v. Kalidas Banerjee* (a), which is based upon two cases, *Azund Chunder Masoomdar v. Geburahun Khan* (b), and *Dwarka Nath Sahoo Khan v. Deorga Churn Saha* (c). The case of *Tarif Biswas v. Kalidas Banerjee* (a), no doubt fully bears out the proposition.

(1) See *post*, p. 291.

(a) 2 B. L. R., A. C., 223.

(b) 5 W. R., S. C. C. Ref., 19.

(c) 6 W. R., S. C. C. Ref., 1.

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is no provision in the Civil Procedure Code for enforcing a kistbandi which has not in any way been incorporated with a decree. A decree alone can be enforced.

put forward by the respondent's pleader, but inasmuch as that case furnishes no reasons, but implicitly relies upon and follows the authority of the other two earlier cases above alluded to, we cannot regard it as an authoritative declaration of the law beyond the fact that it professes to follow two cases previously decided. The first case on which it is based, namely, that of *Annud Chunder Mozoomdar v. Goburdhun Khun (a)*, does not appear to contain anything in support of the proposition laid down in the Bengal Law Reports; and the judgment in the second case, namely, *Dwarkanath Sadhoo Khan v. Doorga Churn Saha (b)*, on being read with the case as submitted, merely tends to support the proposition which we admit is a correct proposition of law, that, where an arrangement by kistbandi or otherwise has been incorporated in a decree, and forms part of that decree, execution can be sued out. Moreover, in this case it must not be forgotten that the kistbandi was executed, not only for the money due under the decree but for other sums of money, so that even if the authority upon which the pleader for the respondent relies, and we may say fairly relies, was perfectly correct in law, still the present case is clearly distinguishable by reason of the kistbandi in it covering sums of money other than the sums decreed; and I do not think that any case has gone to the length of holding that the kistbandi executed for the payment of a sum due under a decree and for other sums of money due can be executed in a sum-

mary manner by execution being taken out under it, instead of the more regular form of proceeding by a regular suit.

This objection of the defendant prevailing, the suit of the plaintiff is necessarily dismissed. But I would also observe on the second branch of the case that the circumstances under which the kistbandi was executed, the time for the repayment of the small sum of Rs. 180 being twenty years, and the amounts of the instalments being less than Rs. 10 a year, clearly indicate that the judgment-debtor was not to be harassed so long as it pleased him, for no reasonable person could believe that any one would require twenty years to repay the small sum of Rs. 180. These circumstances tend to cast a cloud of suspicion over the truth of the transaction disclosed by that kistbandi and so clear was the defendant in his impression that the kistbandi was not *bona fide*, that he was prepared to abide by the evidence of the plaintiff himself with regard to its *bona fides*, and he accordingly prayed that the plaintiff should be examined. The prayer was a very proper one, and should have been granted, but it appears that owing to some views which both the Courts below took of the matter wholly irrelevant to the question to be tried, his prayer was rejected. Therefore, in deciding the case as we have done on the other ground, although this was not a technical point, but a very material point in the case, I am glad to observe that there is much in the case besides that

(a) 5 W. R., S. C. C. Ref., 19.

(b) 6 W. R., S. C. C. Ref., 1.

The Advocate-General for the respondent called the attention of the Court to the case of *Madhub Chunder Dhundput v. Madhub Lall Khan* (1) and the cases therein referred to, and

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to satisfy us that the ends of justice would be better served if the plaintiff were left to resort to a regular suit to prove the *bona fides* of the *kistbandi* on which he relies. The special appeal will, therefore, be allowed, and the suit of the plaintiff dismissed with all costs.

in this case is correct. It was passed in execution of a decree for a debt of Rs. 5,551. After the decree had been passed, it appears that the decree-holder and the judgment-debtor came to some arrangement, under which it was agreed that the judgment-debtor's property should not be put up for sale, and that the amount of the decree should be paid in instalments at a very large rate of interest from year to year for eight years. Under this the amount of the decree swelled from Rs. 5,551 to nearly Rs. 20,000.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

The 22nd November 1871.

KANHAYALAL PUNDIT (DECREE-HOLDER) v. THE COLLECTOR OF CUTTACK FOR THE COURT OF WARDS, ESTATE OF RAJA PUDDO-LABHUNJOO BAHADOOR (JUDGMENT-DEBTOR).*

Kistbandi—Execution.

Where a decree was obtained for a sum of money, and afterwards by an arrangement between the judgment-debtor and the decree-holder it was agreed that the decree should be payable by instalments with interest at a very large rate, and payments had subsequently been made of large sums of money in the terms of the arrangement, and a balance remained due, it was held that the decree-holder could not recover in execution of the decree any sum beyond what was stated in the decree.

Baboo Mohendro Lall Mitter for the appellant.

Baboo Unoda Persad Banerjee for the respondent.

The judgment of the Court was delivered by

E. JACKSON, J.—We think that the decision of the lower Appellate Court

In 1860 the first instalment was paid by the Raja. Subsequently to that however, the instalments appear not to have been paid; but in 1871, the property having in the meanwhile been taken possession of by the Collector of the District as the Court of Wards, a sum of Rs. 14,877-1-5 was paid into Court. There remained then only Rs. 4,083-4-5 still due, under this agreement between the parties, and for this sum the decree-holder is now taking these proceedings. The lower Court has held that this sum being in excess of the amount originally decreed, cannot be obtained in execution of this decree. It is very certain that this sum could not, in any way, have been obtained under the terms of the decree passed in this suit. In order to obtain it, the decree-holder must prove the execution of the subsequent agreement.

It is true that mere agreements to pay the original decree by instalments have been frequently upheld, and

(1) *Ante*, p. 288.

* Miscellaneous Regular Appeal, No. 238 of 1871, against a decree of the Subordinate Judge of Zilla Cuttack, dated the 1st June 1871.

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shewed the distinction between that case and the present one by pointing out that in that case the kistbandi had not only been incorporated into the decree, but that sums other than those mentioned in the decree were to be recovered under the kistbandi. But here the Court below found that the kistbandi was part and parcel of the decree, and had been acted upon by both parties as such. It comes within the meaning of ss. 206 and 212. The kistbandi became a decree by consent. The same principal was adopted in *Tarif Biswas v. Kalidas Banerjee* (1), [*Baboo Kalimohun Doss*.—The ruling in that case was overruled by the Full Bench decision in *Krishna Kamal Singh v. Hiru Sardar* (2).] There it was merely ruled that a decree could not be altered, but if the parties came before the same Court that passed the decree, as here, and consented that the decree should be altered either as to the amount or as to the mode of enforcement, and that interest should be added, the Court, I submit would have the power to alter the decree. Here no formal decree was drawn, but the kistbandi was treated as the decree by the Court of execution so as to allow execution beyond the period of limitation prescribed by the law. [Couch, C.J.—Is not that substituting a new decree for the original one?] Supposing it is so, could the party who consented to it at the time and acquiesced in it for years, now object? Here no new formal decree was drawn, but the kistbandi became by consent a decree.

Baboo Kalimohun Doss in reply.—In *Krishna Kamal Singh v. Hiru Sardar* (2) it was ruled that the terms of a decree could not be altered. The case of *Darbha Venkata Sastri v. Vurella Gangai* (3) was also referred to.

properly upheld, but this is a case in which the judgment-debtor has agreed to pay a very large sum of money over and above the amount of the original decree, and we are informed that even the validity of that agreement can be contested. Under these circumstances, it would not be proper in execution of this decree to direct the payment by the judgment-debtor of

a sum beyond what is stated in the decree. The party can always bring his suit to enforce the contract subsequently entered into between him and the judgment-debtor.

The appeal is dismissed with costs.

(1) 2 B. L. R., A. C., 223.

(2) 4 B. L. R., F. B., 101.

(3) 2 Mad. H. C., 305.

The judgment of the Court was delivered by

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Couch, C.J.—The decree in this case was made on the 1st of July 1863, and by a kistbandi, dated the 3rd of July 1864, it was agreed that the amount payable by the decree should be paid by instalments with interest. It was an arrangement which the decree-holder might very reasonably make, for although his decree did not give interest he was entitled to have the money paid at once. He seems to have arranged with the debtor that he would receive it by instalments with interest in consideration of the payment being postponed. Then it appears that an application was made for execution on the 8th of May 1866, and notice was served. That being struck off, a third application was made on the 4th of December 1866, and the property of the debtor was attached and advertized for sale. A part-payment was made, which was certified to the Court by an application, dated the 7th of March 1867, on the part of the debtor, he also asking to have the money applied towards satisfaction, of the terms of payment in the kistbandi, treating that as being what was intended to be enforced. Then, on another instalment becoming due, the decree-holder took out execution on the 23rd of January 1870, and the property being advertized for sale, the debtor made an application, which was assented to by the decree-holder, for time to pay the amount which was due, again treating the kistbandi as a binding arrangement, and that which the Court was enforcing by execution proceedings. This application was struck off on the 30th of May 1870, and the amount not being paid as had been agreed, another application was made for the sale of the property on the 22nd of May 1861. Then the judgment-debtor objected to the sale on the ground that a fresh attachment was necessary. No objection was made at that time that the original decree must be enforced, and not the kistbandi. The Judge finds that these facts show that the parties had treated and acted upon the kistbandi as if it had become part of the decree, and that they moved the Court to credit the payment which was made as a satisfaction of the instalments due according to it. Under these circumstances, I think that the present appellant is pre-

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cluded from saying that the judgment-creditor is bound to execute the original decree, and if he cannot execute that, he is bound to bring a regular suit upon the kistbandi. He has, by his conduct for some years, treated this as the decree which the Court had made. Without deciding how far an alteration of a decree, such as this was, could be made by consent, at the time the kistbandi was entered into, I think we must hold in the present case that the objection taken cannot, and ought not, to prevail. The decree-holder is entitled to take proceedings upon the kistbandi as if it were a part of the original decree. The appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Phear, and Mr. Justice Markby.

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THE QUEEN v. SEWA BHOGTA.*

Act X of 1873, s. 13 - Omission to take Evidence on Oath or Affirmation.

The word "omission" in s. 13 of Act X of 1873 includes any omission, and is not limited to accidental or negligent omissions.

JACKSON, J., dissented.

THE prisoner in this case was convicted of murder and sentenced to death. The principal witness against him was his nephew, a boy of ten years of age, who was examined at the trial before the Judicial Commissioner of Hazaribagh on simple affirmation only.

The prisoner appealed to the High Court. The case came on before Couch C.J., and Ainslie, J., who referred to a Full Bench the question, whether the word "omission," in s. 13 of Act X of 1873, includes any omission, and is not limited to accidental or negligent omissions. The reference was made in

* Criminal Reference No. 598 of 1874 from the Judicial Commissioner of Chota Nagpore, dated the 20th August 1874.

consequence of the decision in *Queen v. Anunto Chuckerbutty* (1).

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(1) *Before Mr. Justice Kemp and Mr. Justice Birch.*

The 20th April 1874.

THE QUEEN v. ANUNTO CHUCKERBUTTY AND OTHERS.*

Act X of 1873, s. 13—Omission to take Evidence on Oath or Affirmation.

S. 13 of Act X of 1873 does not render the evidence of a child of nine years of age inadmissible, if the evidence has been advisedly, and not by an omission, recorded without any oath or affirmation.

The prisoners were charged with abducting one Prosoanno, a girl, nine years of age, from the lawful guardianship of her uncle Luckhynarain Dey, for the purpose of marrying her to the prisoner Anundo Sen. Upon the trial, the evidence of the child was advisedly, and not by omission, recorded without any oath or affirmation.

The prisoner having been found guilty, and sentenced to various terms of imprisonment, appealed to the High Court.

Mr. Reily (Baboo Juggut Chunder Banerjee with him) for the appellants.

The judgment of the Court was delivered by

KEMP, J.—Anunto Chuckerbutty, Anundo Sen, Haradhan Dey, and Aduri have been convicted by the Sessions Judge of Midnapore under s. 363 of the Indian Penal Code, and the prisoners Anunto Chuckerbutty and Anundo Sen have been sentenced to four years' rigorous imprisonment, and Haradhan Dey and the female prisoner

Aduri to two years' rigorous imprisonment. The Sessions Judge also finds the prisoners guilty of an offence under s. 366 of the Code, but he passes sentence under s. 363 for the offence of kidnapping.

The first point taken by the learned Counsel who appears for the prisoner is, that the evidence of the witness Prosoanno, the niece of the prosecutor, or rather of the principal witness in

this case Luckhynarain Dey, is not admissible, inasmuch as that evidence has not been recorded on oath or solemn affirmation. Under s. 118 of the Evidence Act, all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. This witness would come under the description of a witness of tender years, being only nine years of age, but the Judge says, that she appeared to be a very intelligent girl, and thoroughly understood what she was about when questions were put to her. Therefore, this witness would be a competent witness, although of course the amount of credence to be given to her evidence is quite another matter; but the learned Counsel further objects that although the girl is a competent witness under s. 118, yet, inasmuch as all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties

* Criminal Appeal, No. 230 of 1874, against an order of the Sessions Judge of Midnapore, dated the 19th March 1874.

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The parties were not represented.

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The following judgments were delivered by the Full Bench :

COUCH, C.J. (KEMP, PHEAR and MARKEY, JJ., concurring) :—We are of opinion that the word “omission,” in s. 13 of Act X of 1873, includes any omission, and is not limited to accidental or negligent omissions. In this case the affirmation was in fact omitted to be made, although it was done deliberately and under the direction of the Judge. The intention appears to have been to provide for every omission, substitution, or irregularity. There is therefore no objection to the validity of the conviction, but under the circumstances, and

authority to examine such persons, or to receive evidence, should be examined on oath or solemn affirmation, the witness Prosonno ought to have been so examined. S. 13 of the Oaths Act says, that no omission to take any oath or make any affirmation, no substitution of any one for any other of them and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth. Now this appears to me to apply, for instance, to the case of a person who has made a statement which is subsequently found to be a false statement, that he shall not get rid of the obligation of stating the truth by setting up a plea that there has been an omission on the part of the Court to administer to him an oath or solemn affirmation. It does not appear to me that this section would render the evidence of a child nine years old, whose evidence as in this case has been advisedly, and not by

omission, recorded without any oath or affirmation, admissible as evidence ; but be that as it may, there is independent evidence in this case of the aunt of the child, of the uncle of the child, of two neighbours, and I may say, the statement of Aduri herself, the grand-aunt of the child, and of Haradhun Dey, who is also one of the accused before the Magistrate. (The learned Judge then went into the other evidence in the case, which in the opinion of the Court proved that the child Prosonno was while in the lawful guardianship of her uncle Luckhynarain, and during his temporary absence from home, enticed away by her grand-aunt Aduri, and married against her will, and without Luckhynarain's consent, to Anundo Sen. He continued) :—Looking to the time at which the offence was committed during the absence of the girl's legal guardian, and to the fact that the girl was married against her will, we think the offence a very serious one, and we are therefore not disposed to mitigate the sentence which has been passed upon the prisoners by the Sessions Judge. The appeal is rejected,

considering the evidence in the case, we think the sentence of death should not be confirmed. Instead thereof we pass a sentence of transportation for life.

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JACKSON, J.—I am unable to concur in the opinion of the majority, as I cannot take the same view of the intention of the Legislature in using the word “omission.”

It seems to me that, in framing the 13th section of the Oaths Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates to render the whole Act as it were ineffectual, by perversely or erroneously ordering that witnesses should not take an oath or affirmation. It will be borne in mind that the oath is not merely imposed in criminal cases by the Act X of 1873, but the Code of Criminal Procedure, s. 331, expressly requires that witnesses shall be examined on oath or affirmation, &c., according to the provisions, &c.

It seems to me, therefore, that the Judge in this case having been directed by law to examine the witness in question upon affirmation, and having determined that he would not administer such affirmation, the witness has been examined contrary to law, and the evidence is inadmissible.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Mitter.

GATHA RAM MISTREE (PLAINTIFF) *v.* MOOHITA KOCHIN
ATTEAH DOMOONEE AND ANOTHER (DEFENDANTS.)*

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*Suit for Restitution of Conjugal Rights—Form of Decree—Act VIII of
1859, s. 200.*

Per MARKBY, J.—In a suit by a husband for restitution of conjugal rights, a decree that “the case be decreed awarding the plaintiff to take defendant as his married wife,” is not a proper form of decree.

The decree may order the wife to return to her husband’s protection, but such a decree is not one which can be enforced in the manner provided by s. 200, Act VIII of 1859, as being an order “for the performance of the particular act.”

Suit for restitution of conjugal rights. The plaintiff alleged that he married the first defendant according to the custom prevailing among his caste, that she lived with him as his wife for some time, and that he was subsequently dispossessed of her.

The defendants denied that there was any valid marriage between the plaintiff and the first defendant.

The evidence showed that the plaintiff had, on taking the defendant as his wife, given a feast to the people of his caste, and that, by the custom among them, a marriage is held to be valid if it be so celebrated.

The Extra Assistant Commissioner held that, according to the local custom, there was a valid marriage, and that the plaintiff had been deprived of his wife, and he ordered that “the case be decreed awarding the plaintiff to take the defendant as his married wife.” This decision was reversed on appeal, the Deputy Commissioner being of opinion that there had been no valid marriage; and the suit was accordingly dismissed.

*Special Appeal, No. 2221 of 1873, against a decree of the Deputy Commissioner of Zilla Nowgong, dated the 16th of June 1873, reversing a decree of the Extra Assistant Commissioner of that district, dated the 14th of May 1873.

The plaintiff preferred a special appeal to the High Court from this decision.

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Baboo Aukhil Chunder Sen for the appellant.

Baboo Issen Chunder Chuckerbutty for the respondents.

The judgment of the Court was delivered by

MARKBY, J.—In this case the plaintiff sues for the restitution of his conjugal rights. The defendants (the alleged wife and her mother) denied the marriage. The first Court found that the marriage had been solemnized according to the custom of the caste to which the parties belonged, the principal feature in the ceremony being the giving of a feast to their own community. The Deputy Commissioner has reversed this decision on grounds which appear to us altogether arbitrary. He does not dispute that the ceremony took place, but thinks it does not constitute a formal marriage ceremony so as to be binding. No reasons are given for this opinion, which is directly contrary to the evidence, and the consequences of such a decision might be very serious.

We, therefore, set aside the judgment of the Deputy Commissioner, and order him to retry the appeal.

This is the judgment of the Court. But I think it right to add, on my own behalf, some observations upon the form of the decree and the nature of the proceedings which may be taken upon it. This seems to me the more necessary inasmuch as the first Court in this case made a decree in a form which this Court has expressly and authoritatively declared to be erroneous.

The cases in which it has been decided that a decree in favor of the husband whose marital rights are withheld ought to be made, are to be found in *Jhotun Beebee v. Ameer Chand* (1), *Koobur Khansama v. Jan Khansama* (2), and *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (3).

The decrees in the two former cases declared the husband

(1) 1 I. J., N. S., 317; S. C., 6 W. R., 105.

(2) 8 W. R., 467.

(3) 11 Moore's I. A., 551.

1875 "entitled to his conjugal rights," and ordered the wife "to return to his protection." The Privy Council did not make any decree.

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Up to the point of saying that the suit will lie, and of making a decree to the above effect, there is neither doubt nor difficulty. Whenever the law recognizes that the relation of husband and wife exists, it also recognizes that the husband is bound to live with the wife, and the wife with the husband: and if that obligation be denied by either of the parties to the marriage, Courts ought certainly to declare the right to exist. If also any person should interfere and prevent the wife from returning to her husband, or the husband to the wife, there is no difficulty, as far as I can see in punishing this invasion of the rights of others, and even in compensating the injured party to some extent. The real difficulty arises when we come to deal with a refusal to perform the conjugal duties by one of the parties to the marriage, after the existence of the matrimonial relation has been ascertained.

It appears to have been at one time thought that, in this country, the duty of cohabitation should be enforced by seizing and making over the recreant party bodily to the claimant; and cases are mentioned in which this has been directed in the case of a wife refusing to return to her husband. I am not aware of any case in which it has been suggested that similar violent measures should be taken against a husband refusing to receive his wife: and the cases in which a wife has so been treated are obviously based upon the notion that the husband purchases the wife at marriage, and that she thereby becomes an article of his property. Widely as this notion has prevailed in the world, I need scarcely say that it is wholly abhorrent to the Hindu law.

In what way then is the decree to be enforced? As far as I have been able to discover there is but one recent case direct upon this point, and as I am unfortunately unable to agree with the opinion there expressed, greatly as I respect it, I feel myself bound to consider the question at some length.

Macpherson, J., in the case of *Jhotun Beebee v. Ameer*

Chand (1), after expressing his opinion that the person of the wife cannot be taken in execution, says that "a suit will lie for a declaration that the husband is entitled to his marital rights and for an order that the wife do return to him and live with him. Such an order is an order 'for the performance of a particular act' within the meaning of s. 200 of Act VIII of 1859; and if the wife refuse to obey it, the decree may be enforced, as that section provides, by the imprisonment of the wife, or by attachment of her property, or by both imprisonment and attachment." Seton-Karr, J., in the same case adhered to the view that the wife could be delivered over bodily to the husband in execution. Jackson, J., concurs with Macpherson, J., in thinking that there can be no delivery of the body of the wife to her husband. This judgment, however, is not quite so explicit as to the mode in which the decree is to be enforced, and no doubt that question was not strictly speaking under judicial consideration.

Assuming, as laid down in that case and in the case of *Koobur Khansama v. Jan Khansama* (2), that the decree ought to contain an order to the wife to return to her husband's protection, still I doubt whether such an order is an order "for the performance of a particular act" within the meaning of s. 200 of the Code of Civil Procedure. I think some meaning is to be given to the word "particular," and an order to a wife to return to her husband's protection cannot, in my opinion, be called an "order for the performance of a particular act." It clearly could not be said that such a decree would be obeyed simply by a return to the husband's house only. I think the decree is intended as an order to the wife to live with her husband, to remain in his house, and there to perform the duties of a wife. Now, if we accept the view that marriage is a contract, and that such an order is an order for specific performance of the contract we are at once met by this difficulty that it would be contrary to well-established principles that such a decree, to be so enforced, should be made at all. It is not, I believe, considered to be within the province of the Court of Chancery in England, and

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(1) 1 I. J., N. S., 317; S. C., 6 W. R., 105.

(2) 8 W. R., 467.

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I have no reason to believe that it is within the province of the Courts here, to decree specific performance of continuous duties which the Court has no means to enforce except by repeated infliction of fine and imprisonment. This I understand to be the opinion expressed by the Lord Chancellor Cranworth in *Blackett v. Bates* (1) overruling the decision of Wood, V. C., who had attempted to do something of the kind, but which attempt the Lord Chancellor characterized as "perfectly novel." This seems to be in accordance with previous decisions. There is, no doubt, a good deal of discretion in such cases, but I do not think a contract of marriage could possibly be enforced without taking a very different view of the powers of the Courts of this country from that taken of their own powers by English Courts of Chancery. The case most like this is that of contracts of partnership which are not specifically enforced, the reason frequently given being that it would be like attempting to enforce a contract of marriage—Lindley on Partnership, p. 991. Moreover, though I feel bound emphatically to dissent from the opinion of Seton-Karr, J., that a wife's person can be seized in execution of decree, I think there is force in his observations on the proposed proceedings under s. 200, where he says, "nor do I think that the provision for imprisonment of the party (in s. 200) against whom the decree is made and for attaching his property ought, or was intended, to apply to such a case. Surely it would be a harder course to imprison a reluctant wife than to deliver her to her husband who wishes to cohabit." Seton-Karr, J., seems to have thought that, if you are to compel the woman to cohabit at all, then the direct way of doing so, by delivering her person to her husband, is not more inhuman, and infinitely more effectual, than throwing her into prison; and so far I am disposed to agree with him.

It appears to me, however, that such a decree cannot be considered as one for the specific performance of a contract at all. I am not unwilling to look upon marriage as a contract but I do not think it is a contract which Courts of law would be

(1) L. R., 1 Ch., 117.

wise to undertake specifically to enforce. I think the case is one of an entirely exceptional kind. The Privy Council in *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1) have held that a suit for the restitution of conjugal rights will lie. I do not think any stress should be laid on the term "restitution of conjugal rights" as there used, or that it expresses in any way definitely what sort of a decree should be given, or what proceedings can be taken subsequent to decree. This decision, so understood, I cheerfully accept; because it appears to me that it is absolutely necessary that a husband and wife should have some means of obtaining an authoritative decision as to whether or no they really stand in that relation. If a decision cannot be obtained binding on all the world, it is at least desirable that one should be obtained binding upon themselves, and upon which other persons may act with a reasonable degree of safety. But I consider the Privy Council to lay down no more than that a suit to ascertain the existence of this relation can be maintained, and carefully to abstain from laying down any final propositions of law upon the exact form of decree, or exact mode of enforcing the decree. All the rest of the judgment is intended, as I understand it, to call attention to the importance and gravity of the matter, and to overrule emphatically the contention then put forward at the bar, that no suit of the kind would lie in India at all.

I do not, indeed, think it likely that any one will contend that the bare declaration of the existence of the relation, even if not "relief" in the technical sense of that term, is not of the greatest value and assistance to the parties: what seems to be considered is that the Courts *must* in order to be logically consistent follow up this declaration with all the powers which they possess.

That the Courts, however, are not hemmed in by any such absolute necessity is, I think, indisputable. The simplest and most direct and indeed the only really effectual mode of enforcing the obligation, and, therefore the one to be adopted, if

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the Courts have no discretion in the exercise of their powers, is to bring the parties together by force. But this has been universally repudiated, not only in India, as is above shown, but in every other country, as shocking to our feelings of humanity. The alternative of forcing the recusant party into compliance by imprisonment is a course which to my mind has little to recommend it by comparison, and though not quite as universally condemned has also been very generally repudiated. During the anxious inquiry which I have thought it my duty to make upon this subject, I have ascertained that upon the continent of Europe the right both of the husband and of the wife to cohabitation (in the etymological sense), the husband selecting the place of residence, is everywhere considered as altogether beyond dispute. So also is the right to proceed against and to punish any third person who detains a wife from her husband ; so also is the right of the husband to maintain a suit against the wife if she refused to acknowledge the marital rights. But all attempts at enforcing this duty by compulsion have been abandoned or very nearly so. The only trace of compulsion which I have found is in some smaller States of Germany, where a very small fine or a few day's simple confinement of the woman appears to be allowed. If this produces no effect, no further punishment can be inflicted. The Prussian Courts have expressly decided that no direct compulsion whatever can be applied. The matter has been the subject of considerable discussion in Austria and in France. In the latter country, I am informed on the highest authority, that the question has been settled against the use of compulsion. In Austria I am not sure that the question has been finally set at rest, but I have reason to believe that the leaning is strongly against the use of any such means.

If we consider the law of England, I think the difficulties about the Civil Court attempting to enforce by compulsion the observance of conjugal duties are in no way lessened. Perhaps some persons would be inclined at first sight to treat the law of England as affording an example of the almost unbounded exercise of judicial power in this direction : and if we look to forms and words only it is so. The old Ecclesiastical

Courts, that is, the Church, claimed to have the power to enforce specifically the performance of conjugal duties in their minutest particulars, and gave decrees accordingly. But inasmuch as these Courts soon found that they had no effectual independent power of enforcing their decrees when pronounced (3 Bl. Com., 101), this claim was not so substantial as at first sight appears. I am unable to find any exact information in any books available to me as to the exact proceedings which could be taken upon the decree of an Ecclesiastical Court for the restitution of conjugal rights: undoubtedly the Ecclesiastical Court had a right to call in the ordinary civil power in aid of its own weak authority (*Black ubi supra*), but whether from the difficulty of the procedure, or the contempt entertained for those who invoked the assistance of the Court for such purposes (3 Black., 94), such extremities were, I believe, very rarely proceeded to. No doubt the Court which now exercises jurisdiction in matters matrimonial in place of the old Ecclesiastical Courts has the same powers of enforcing its decrees as the Court of Chancery, but I can only find three cases in the reports since the new Court was established in which writs have been actually issued. It is significant that in two of these cases the recusant party had already escaped out of the country.

But surely when we look to the law of England for a guide; it is where that law is in harmony with the general principles of equity and jurisprudence that we should adopt it, not where it is exceptional. That the English law on the subject of enforcing conjugal right is exceptional, I have no manner of doubt. It is based on the Canon Law, or the law of the Church; and, as far as I can gather, the following are the propositions which that law maintained:—(i) that all sexual intercourse, except between husband and wife, is a mortal sin; (ii) that marriage is a divine institution entirely under the control of the Church; (iii) that all marriages not sanctioned by the Church are unlawful; (iv) that divorce is impossible; (v) that the Church can release the parties from their conjugal duties; (vi) that they can enforce these duties in the minutest particulars. The law of England has in modern days to a very great extent rejected these pretensions and modified these views, but they have not

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as yet been radically removed ; rather, however, in my opinion because they produce but small practical evils than from any approval of the principles on which they rest.

The state of the law in America seems to me to show very clearly how repugnant it is to the principles which govern the ordinary Civil Courts to attempt to enforce the performance of conjugal duties by compulsion. The common law of America on the subject of marriage is the law as it stood in England when these colonies were founded : including, therefore, the law of marriage as administered in the Ecclesiastical Courts and based originally upon the Canon Law. But the colonies, though they take the law of the mother country, do not take her Courts, and there never have been in America Courts of ecclesiastical jurisdiction : solely, therefore, because no Court has been specially vested with the particular power of enforcing the performance of conjugal duties, no Court in America ever has enforced these duties ; and that part of the law has in fact become obsolete ; see Bishop on Marriage and Divorce, Ch. iv, *passim*. Nothing could show more strongly how completely this portion of the English law stands apart from the ordinary law of the country.

It appears to me, therefore, that if we were to hold that a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment, we should place the law of this country in opposition to the law of the whole civilized world, except the ecclesiastical law of England. That the ecclesiastical law of England is not binding upon or suitable to the non-Christian inhabitants of this country, even where there is jurisdiction to apply it, is fully shown by the decision of the Privy Council in *Ardaseer Cursetjee v. Perozeboye* (1). The remedy for matrimonial grievances must (as there shown) be applied by the ordinary Civil Courts, acting upon ordinary legal principles and applying the law of the community to which the parties belong. There is nothing which leads me to suppose that the Hindu law is less humane in this matter than that of other civilized countries, or that severer remedies are required

(1) 6 Moore's I. A., 248.

here in case of matrimonial differences than have been found effectual elsewhere.

For these reasons, although I think that the existence of the relation of husband and wife ought to be enquired into in this case, and if it exist, declared, and though I think there is no reason why the decree should not order the wife to return to her husband's protection, as has been done in the other cases, and as her duty clearly is, yet I cannot give my assent to the proposition that this decree is enforceable by the mode pointed out in s. 200 of the Code of Civil Procedure. That question has not yet formally arisen for determination, but as in the other cases, whilst making a decree, an opinion has been expressed as to how it is to be enforced, I have thought it right to express my opinion also.

Appeal allowed.

Before Mr. Justice Markby and Mr. Justice Mitter.

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GUNGAHURRY NUNDEE AND ANOTHER (DEFENDANTS) v. RAGHUBRAM NUNDEE (PLAINTIFF).*

Possession, Delivery of—Title—Hindu Law—Vendor and Purchaser,

Delivery of possession is not necessary to the transfer of ownership among Hindus.

Per MARKBY, J.—As a general rule of law, when a vendee has got a document which in terms professes to make over property, and the document is registered (in case registration is necessary), he becomes at once the owner without actual delivery of possession.

THIS suit was brought to obtain possession of a share of certain property, which the plaintiff alleged he had purchased from Jussodanundo Nundee, one of the defendants. The defendants were previously to 1278 (1871) living in joint possession and enjoyment of the property in suit, but in that year two of the defendants, Gungahurry Nundee and Brojohurry Nundee, effected a separation between themselves and Jussodanundo, but did not give him possession of his share of the joint property. Jussodanundo in 1280 (1873), while still out of possession, sold his

* Special Appeal, No. 962 of 1874, against a decree of the Judge of Zilla East Burdwan, dated the 14th of February 1874, affirming a decree of the Mansif of Jehanabad, dated the 29th of November 1873.

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share in the estate to the plaintiff. The defendants Gungahurry and Brojohurry alleged that the separation took place in 1265 (1858); that Jussodanundo had not been in possession within twelve years; and therefore the suit was barred by limitation.

The Moonsiff found that the separation took place in 1278, and that the suit was not barred, and gave a decree for the plaintiff; and this decision was affirmed by the Judge on appeal. The defendants appealed to the High Court, on the ground, among others, that as the vendor Jussodanundo had been out of possession when the deed of sale was executed, the plaintiff could not make a valid title to the property in suit under a document which had not been accompanied or followed by possession.

Baboo *Rash Behary Ghose*, for the appellants, contended that delivery of possession was, by Hindu law, necessary to complete the plaintiff's title; and that his vendor having been out of possession at the time of sale, and having never given delivery of possession to the plaintiff, the plaintiff was not in a position to maintain the suit. He cited *Raja Sahib Prahlad Sen v. Baboo Budhu Sing* (1), *Ranee Bhibosoondoree Dasseah v. Issurchunder Dutt* (2), and *Tara Soondaree Chowdhraïn v. Collector of Mymensingh* (3).

Baboos *Gooroo Doss Banerjee* and *Kisto Komul Bhuttacharjee*, for the respondent, contended, that delivery of possession was unnecessary, and cited *Menu, Ch. viii, v. 200*; *Najubai v. Motigir Guru* (4), *Bhukan Bhaibava v. Bhaiji Prag* (5); he also referred to *Tara Soondaree Chowdhraïn v. Collector of Mymensingh* (3).

Baboo *Rash Behary Ghose* in reply.

The following judgments were delivered:—

MARKBY, J.—In this case three persons being in possession of property as a joint Hindu family, two out of that number ejected

(1) 2 B. L. R., P. C., 111; S. C., 12 Moore's I. A., 275.

(2) 11 B. L. R., 36.

(4) 1 Bom. H. C. Rep., 5.

(3) 13 B. L. R., 495,

(5) *Ibid*, 19.

the third. Whilst the third member was out of possession, he sold his share in a specified portion of the property to the plaintiff, who brought his suit for possession against the other co-sharers. Both the lower Courts gave the plaintiff a decree. The only objection taken in special appeal, which appeared to us necessary to reserve for consideration, was this :—That as by the plaintiff's own admission his vendor was out of possession when the conveyance was executed, the plaintiff could not make a valid title to the property in dispute under a document which had not been followed or accompanied by possession.

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This in substance raises the very broad and general question whether upon a contract of sale and purchase delivery of the possession of the thing sold is necessary to complete the title of the vendee.

There seems never to have been any suggestion that, under Mahomedan law, delivery is necessary to the transfer of ownership of either moveable or immoveable property except in the case of gifts. So by the common law of England it is not necessary in the case of moveables : and though it was at one time necessary in the case of immoveables, under the Statute of Uses it is no longer so. The only question can be whether under Hindu law there is any difference in this respect.

It would no doubt lead to considerable inconvenience if the law upon such a subject varied with the religion of the parties to the transaction ; and upon the whole I think the general rule has been adopted in India that in the case of purchase and sale the ownership is acquired by the purchaser, though the transaction has not been followed by delivery.

That this is the accepted law of India is, I think, shewn by the Registration Acts. In the first place the existence of a system of registration *prima facie* suggests that ownership is acquired without delivery. The reasons for the rule, which has so widely prevailed, requiring delivery for the transfer of ownership are not of one simple character. Whether, however, this ceremony was required because, taking place in public, it carried with it the consent of the community to which the parties belonged or because, taking place before an officer of justice, it carried the consent of the State, or simply because the transaction is

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one which ought to be notorious and open, so that all persons may know when it takes place (all of which influences have at one time or other affected and can still be traced on it), it has almost everywhere been supplanted by registration; and scarcely anywhere retained concurrently with registration.

Moreover, if we look at the special provisions of the Indian Registration Act, I think it will be seen that the framers of it contemplated, not a condition of the law in which delivery was rigorously required, but a condition of the law in which ownership both of moveables and immoveables was frequently transferred without delivery. The view taken in the Act seems to be the ordinary English view that a document executed by the parties may operate not only as a contract but as a conveyance; and the general object of the Act seems to be to require that such documents should be registered in order to have that operation. It may not be impossible to look upon the Act as providing for a registration of contracts only, and not of titles. But if so, a great deal of the language of the Act would be superfluous and unmeaning. Throughout Part X of the last Registration Act, the Act seems to contemplate that the document, if registered, will "take effect" (which must I think mean "will operate as a conveyance") as soon as executed, if the requirements as to registration have been fulfilled. It is true that a certain advantage is given to a purchaser who has obtained delivery, but that does not show that such a purchaser had this advantage independently of the Act. It rather points the other way.

The conclusion, therefore, at which I should arrive is, that by the law of this country delivery is not generally necessary for a transfer of ownership: but it was contended that there are certain recent cases in which a contrary proposition has been laid down.

The first of these is the case of *Raja Sahib Prahlad Sen v. Raboo Budhu Singh* (1). The Privy Council in that case, commenting on a judgment of the Sudder Court, use these words, which have since been so often referred to: "They" (the

(1) 2 B. L. R., P. C., 111; S. C., 12 Moore's I. A., 275.

Judges of the Sudder Court) "seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases—*Gopeschurn Kur v. Koroon Dabee* (1) and *Surbonaraj Singh v. Maharaj Singh* (2) cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the purchaser may claim a specific performance if he comes into Court, showing that he has himself done all that he was bound to do."

If this passage be taken alone, it cannot be denied that the doubt here expressed goes to the full extent of raising the question whether "*in any case*" the ownership could be acquired without delivery. Nor can it be for a moment contested that these observations are unimpeachable in theory. They represent the views which have prevailed amongst lawyers generally in some shape until displaced by legislation or recognized practice. But nevertheless it must be borne in mind that they have been in fact so displaced to a very large extent. And I feel confident that the Privy Council did not intend to exclude the consideration of the question whether under the actual Hindu law delivery was still necessary, because they do not either directly or indirectly decide the question thus raised: the decision of the case did not in any way involve as a proposition of law that delivery was in all cases necessary to a transfer of ownership.

(1) S. D. A., 1857, 225.

(2) S. D. A., 1858, 601.

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The next case is *Rani Bhobosondree Dassiah v. Isuri-chunder Dutt* (1), and is also a decision of the Privy Council. The passage above quoted is quoted by the Privy Council from their former decision, and it must, therefore, be taken that the same doubt is reiterated : but the decision was given with reference to the particular provisions of the document then in question, upon the construction of which it appears to have been held that it did not operate as a conveyance.

The remaining case is a decision of this Court, in *Tara Soondaree Chowdhraïn v. Collicor of Mymensingh* (2). But the main ground of that decision was that the transaction then under consideration was hontrary to public policy : it does not decide the question which the Privy Council had left in doubt.

As far as I am aware this is the first time the Court has been called upon directly to decide this question ; and upon the whole, not feeling myself prohibited by the doubt expressed by the Privy Council, I feel bound still to say that in my opinion delivery has not been considered generally necessary to the transfer of ownership by Hindus in this country.

Of course there may be cases in which, from the nature of the transaction, it is plain that the ownership was not intended to be transferred immediately, but only at some future time or under some condition : it may also, when a question arises as to which out of two honest purchasers has the better title, be important to consider who has got the possession. Upon this I say nothing. But, as a general rule of law, I consider that when the vendee has got not a mere contract to convey, but (as is admitted to be the case here) a conveyance, that is to say, a document which in terms professes to make over the property, and the document is registered (in case registration be necessary,) he becomes 'at once' the owner without further ceremony.

I may add that the decision in *Prankrishna Dey v. Biswambhar Sen* (3) seems to me to be in accordance with this view.

The special appeal is dismissed with costs.

(1) 11 B. L. R., 36.

(2) 13 B. L. R., 495.

(3) 2 B. L. R., A. C., 207.

MITHRA, J.—I concur in this conclusion. It was pressed upon us that, according to Hindu law, delivery of possession is essentially necessary to render the title by sale complete; and it was contended that without it a purchaser does not become the owner of the property sold. As far as I am aware there is no provision in the shasters which can be quoted in support of this contention. On the other hand, the following passage from the Mitakshara, to be found in 1 Macnaghten's Hindu Law, pp. 218 and 219, goes a great way against it. It runs thus:—“The acceptance of gold, cloths, &c., being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as three-fold acceptance; but in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession, otherwise, the gift, sale, or other transfer is not complete. A title, therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it, or with such corporeal acceptance. But such is the case only when of these two the priority is undistinguishable; but when it is ascertained which is first in point of date, and which posterior, then the simple prior title affords the stronger evidence; or the interpretation may be as follows:—‘Evidence is said to consist of documents, possession, and witnesses (1).’ This having been premised as the general rule, the texts, ‘A title is more powerful than possession unaccompanied by hereditary succession’ and ‘where there is not the least possession, there a title is not sufficient,’ (2) have been propounded to point out to which the superiority belongs, where the three descriptions of evidence meet: as for instance in the case of the first acquirer, if a title be proved by witnesses, it is of greater weight than possession unaccompanied by hereditary succession. Again possession accompanied by hereditary succession vested in the fourth descendant, is more weighty than a title proved by documents; but in the case of an intermediate (claimant), a title accompanied with even a small degree

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(1) *Catyayana*, cited in the *Smṛiti Chandrika*.

(2) *Vīramitrodaya*.

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of possession is better than a title destitute of possession (1). This has been expressly declared by Narada: 'for the first, gift is a cause; for an intermediate (claimant) possession with a title; but long and hereditary possession alone is also a good cause.' "(2) From the above quotation it is evident that the title of a purchaser without delivery of possession is complete, although the holder of it labors under certain disadvantages as against a person who acquires a title accompanied by possession. There are also numerous texts in the Hindu law, laying down that a well-defined usage acquires the force of law. And as far as my experience goes, I may state that the conclusion at which we have arrived is entirely in accordance with the usage that now obtains amongst the people of the country. I desire also to add that our view in this matter is not only supported by the provisions of the Registration Act, as shown by my learned colleague, but also by s. 259 of Civil Procedure Code, which lays down that "after a sale of immoveable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale to the effect that he has purchased the right, title, and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

Appeal dismissed.

(1) See Blackstone on this subject; vol. ii, p. 197.

(2) Smriti Chandrika, Vivadatandava.

Before Mr. Justice Phear and Mr. Justice Morris.

MANKEE KOOR (PLAINTIFF) v. SHEIKH MUNNOO (DEFENDANT).*

Cause of Action—Mortgagor and Mortgagee—Adverse Possession—Limitation—Bye-bil-wafa.

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Sept. 18.

The defendant mortgaged certain [immoveable property to the plaintiff by a *bye-bil-wafa*, or deed of conditional sale, dated 20th January 1851. The deed stipulated that the mortgage debt should be repaid on the expiration of three years from the date of the execution. The money was not repaid at the stipulated period, and the mortgagor remained in possession of the property, but there was some evidence to show that he had made payments of interest on the mortgage debt to the plaintiff. In February 1870 the plaintiff took proceedings to foreclose the mortgage, and on 16th February 1872 he instituted a suit for possession [of the property. The defence was that the suit was barred, the plaintiff having been out of possession for more than twelve years previous to the institution of the suit. *Held*, that payment and acceptance of interest was evidence of the continuance of the relation between the parties created by the mortgage deed, and until the mortgagor advanced any rights adverse to the mortgagee, the possession of the mortgagor was permissible, and no cause of action accrued to the mortgagee.

THE plaintiff brought this suit on the 16th of February 1872 for possession of a house under a deed of mortgage in the nature of a conditional sale or *bye-bil-wafa*, dated the 20th of January 1851, and foreclosure proceedings taken upon it on the 17th of February 1870.

The pleas raised by the defendant were that neither the plaintiff nor his ancestor was ever in possession of the property claimed, and that his suit was barred by limitation; that the deed of conditional sale was not genuine; and that the defendant did not receive the notice of foreclosure.

It was proved that the plaintiff had never obtained possession of the house under the mortgage. The Munsif overruled the

* Special Appeal, No. 2545 of 1873, against a decree of the Subordinate Judge of Zilla Patna, dated the 19th July 1873, reversing a decree of the Sudder Munsif of that district, dated the 11th November 1872:

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first plea raised by the defendant, holding that, under the Privy Council Ruling in *Prannath Roy Chowdry v. Rookea Begum* (1), the limitation of twelve years did not apply to cases of mortgage ; and then proceeding to try the case on the merits eventually gave a decision in favor of the plaintiff.

On appeal by the defendant, the Subordinate Judge gave the following judgment :—“ The decision cited does not appear to me to have laid down such a broad ruling as has been supposed by the Munsif. The only point which it expounds is that limitation does not estop the suit of a mortgagee when the possession is not adverse. In the case now under consideration, the possession of the property alleged to have been mortgaged in the deed of *bye-bil wafa* has all along been with the mortgagor, and the question is, whether the possession held by the mortgagor is adverse to the mortgagee. The deed of conditional sale stipulated that the mortgagee was to assume immediate possession of the mortgaged premises, and that the loan given by him was to be repaid on the expiry of three years from the date on which the deed was executed. It is obvious that the mortgagee's right of entry into possession commenced on the date the *bye-bil-wafa* instrument came into existence, and the act of the mortgagor, in withholding the property from him after the execution of the deed, was a hostile act, and his possession thenceforward an adverse possession. It has been argued on behalf of the plaintiff that the possession of the defendant was merely permissive ; but, when it is found, that the retaining of possession by the mortgagor was in contravention of the express terms of the document on which the plaintiff's title is grounded, sufferance cannot be inferred unless proved by some unequivocal act or express word of the mortgagor ; no such thing, however, is established. The plaintiffs have attempted to show that they received rent from the defendant for the use and occupation of the premises in suit, but their failure is glaring. The only evidence to which they have referred in support of their allegation is the testimony of the witness Roton Rai, but all that this witness deposes is, that some ten or eleven years ago, he brought on one

(1) 7 Moore's F. A., 323.

or two occasions some money by way of interest due on a bond of Rs. 100 from the defendant. Even if the single evidence above alluded to be believed, and it be supposed that the witness meant by the bond the deed of conditional sale, still nothing is proved which might help the plaintiffs. Interest is not rent."

The Subordinate Judge accordingly held that the plaintiff's suit was barred by limitation, and reversing the decision of the Munsif, dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Deorga Dass Dutt*, for the appellant, contended that the Subordinate Judge had misconstrued the Privy Council ruling in *Prannath Roy Chowdry v. Rookea Begum* (1), and that the limitation of twelve years did not apply to a case of conditional mortgage. The possession of the mortgagor was merely permissive and could not be accounted as adverse to the rights of the mortgagee so long as he continued to pay the mortgagee interest on the mortgage.

Mr. *Sandel*, for the respondent, contended that the suit was barred, inasmuch as the plaintiff having clearly failed to take possession of the mortgaged property, limitation must be calculated from the date on which the defendant refused to give up possession. Mere payment of rent would not remove the bar.

Baboo *Deorga Dass Dutt* in reply

The judgment of the Court was delivered by

PHEAR, J. (who, after stating the facts, continued) :—It is plain that the first question to which we have to address ourselves is this, namely, when did the plaintiff's cause of action first accrue to him? And, for the purpose of determining this, it is necessary to see what, under a contract such as that which is the foundation of the plaintiff's suit, is the nature of the mortgagee's right. This matter has been more than once discussed in this Court, and has been also dealt with more than once by

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the Privy Council. The last case is that of *Brajanath Kundu Chowdhry v. Khilatchandra Ghose* (1). The subject of appeal in that case was a decision passed by the late Chief Justice upon a mortgage which bore the form of an English mortgage deed. In the judgment of the High Court it was said that the mortgagee's right in the land is a right to possession, subject to the right of the mortgagor to redeem on the one hand, and a right on the part of the mortgagee himself to foreclose that right of redemption on the other. It might perhaps have been well added that it is coupled with this restriction, namely, that possession, if obtained before foreclosure, is merely possession by way of lien and without any beneficial interest. Their Lordships of the Privy Council accepted this view of the High Court, and in a judgment of the Privy Council delivered by Lord Kingsdown in the case of *Prannath Roy Chowdhry v. Rookea Begum* (2), and which is the case referred to by both the lower Courts, it was said that the transaction of mortgage effected by a *bye-bil-wafa* was under the Regulations essentially the same in regard to the relation between the mortgagor and mortgagee as an English mortgage. In the case first cited—*Brajanath Kundu Chowdhry v. Khilatchandra Ghose* (1),—the Privy Council, however, thought that the judgment of the High Court, although perfectly correct in the decision of the particular case before it, was couched in terms which were calculated to extend the bar of the Statute of Limitation somewhat too broadly. They say with reference to the manner in which the High Court had applied, s. 6, Act XIV of 1859 (the late limitation Act):—"It may, however, have been deemed necessary to introduce the exception stated above," i.e., the exception of s. 6, "in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the ordinary Courts of India, might in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest,

(1) 8 B. L. R., 104 ; S. C., 14 Moore's I. A., 144,

(2) 7 Moore's I. A. 323

have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased."

This precise point, however, did not arise in that case, and consequently the Privy Council's expression of opinion does not perhaps amount to a binding authority. But it still is extremely useful as a guide to the proper determination of the matter which is now before us. The Subordinate Judge said in his judgment that the withholding of the property from the mortgagee, after the execution of the deed, was a hostile act, and his possession (that is, the mortgagor's possession) thenceforward an adverse possession. But the Privy Council in the passage just now quoted, said that "their Lordships might," to use their own words, "in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession." Also Lord Kingsdown said in *Pramnath Roy Chowdry v. Rookea Begum* (1), that, under the old Regulation law of limitation, "it could not be laid down as a rule universally true that a mortgagee's proceeding for a foreclosure under a mortgage of the class of *bye-bil-wafa* simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the condition of sale will become absolute, for this indiscriminating ground of decision would include alike adverse occupations, and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the demandant or of others before him." And yet this seems to be, what the Subordinate Judge has done with this judgment before him. The true view seems to be that, although the mortgagee has, on the occurrence of the default named in the deed, a cause of action to recover possession of the property, provided it is then withheld from him adversely, he has no cause of suit if the possession of the property by the mortgagor is from that time held and continued with his permission. And so long as the

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(1) 7 Moore's I. A., 323.

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relation between the mortgagor and the mortgagee created by the *bye-bil-wafa* or mortgage deed can be said to be subsisting, it would probably be right infer that the possession of the mortgaged property by the mortgagor, if it be so held, was had with the permission of the mortgagee, unless some act was done by the mortgagor, or some claim advanced by him, which was inconsistent with the subsistence of that relation.

In the case of *Denonath Gangooly v. Nursing Proshad Dass* (1), it was said :—" Now the cause of action" in a case of this kind, " would arise when two things have concurred : that the plaintiff had a right to possession, and that the defendant was holding possession not premissively, and acknowledging the plaintiff's right, but relying upon his own right, or adversely as it is called. If the plaintiff had not a right to immediate possession, or if, having a right to possession, the defendants were holding with the plaintiff's permission and acknowledging his right, no suit could be brought, in the one case because the right to possession had not accrued, and in the other because it had not been disturbed or denied."

That particular case turned upon another point, and, although the foregoing illustration was made in the course of the judgment of the High Court, the decision itself does not furnish any judicial authority with regard to the question which we have to consider.

In the case of *Srimati Anund Mayi Dasi v. Dharandra Chandra Mookerjee* (2), the plaintiff, mortgagee, was seeking to recover possession of the mortgaged premises from the defendant who had purchased them at an auction-sale held in execution of a decree against the mortgagors. And in that case their Lordships in the Privy Council held that, inasmuch as the possession which the purchaser at an auction-sale obtains, is the possession as of an owner, therefore it must be taken, at least *prima facie*, that, unless the purchaser purchased with notice of the mortgage, from the moment he entered upon the mortgaged premises, his possession was adverse to the mortgagee. And their Lordships expressly said " that the possession of a purchaser under such

(1) *Ante.*, p. 87.

(2) 8 B. L. R., 122 ; S. C., 14 Moore's L. A. 101.

circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee." And, therefore, the case was completely distinguished from any case where the mortgagee might be suing the mortgagor for possession.

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And in the still earlier case of *P rannath Roy Chowdry v. Rookea Begum* (1), which has already been more than once referred to—a case very much resembling the present,—their Lordships of the Privy Council said :—"But if the transaction be viewed, as it should now be regarded under the Regulations, as one of mortgage redeemable at any time by the mortgagor, or those claiming under him in privity with his title his mortgagor, then, as no difference between the law prevalent in India and the law prevalent here as to the relation between mortgagor and mortgagee on this point has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem and advance no other title inconsistent with it, must, *prima facie* at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes, be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality." These last observations are pregnant with exceedingly important matter for consideration. In all cases where the mortgagee has good reason to trust his debtor, it can be very well understood that he may be reluctant to take actual possession of the property which in itself can be no pecuniary benefit to himself, but possession of which has the effect of placing upon his shoulders the burden of keeping the accounts of rents and profits and disbursements, together with the liability to account at any time for all sums received. And it is quite easy to conceive in cases of this kind, where the mortgagee has little occasion to doubt the honesty of his debtor,

(1) 7 Moore's I. A., 323.

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he would readily leave the mortgagor in possession of the property over which he retains his lien in equity. The possession which the mortgagor would in this way have released to him and retain, notwithstanding that no express words might pass between the parties, would be strictly speaking possession enjoyed by the permission of the mortgagee. The two parties thus situated entirely understand their mutual relation; and it surely would not be reasonable, when once an occupation had commenced in this manner, to say afterwards, at any particular point, that it had ceased to be permissive, and had become adverse, unless something had occurred between the parties to change that natural relation. In the judgment of the Privy Council which was first referred to (1), the opinion was expressed that it would be reasonable to infer from the payment of interest that the possession on behalf of the mortgagor was permissive. But the judgment in *Prannath Roy Chowdry v. Rookea Begum* (2) goes even further, and says that the possession of the mortgagor ought not to be treated as adverse, so long as the mortgagor asserts a title to redeem and advances no other title inconsistent with it. "It must be treated at any rate as perfectly reconcileable with, and not adverse to the title of the mortgagee and the continuance of his lien on the thing pledged."

So that, in the case before us, the time when the plaintiff's cause of suit first accrued depends upon the question when, if at all, did the mortgagor's possession first cease to be permissive and become adverse to the mortgagee, i.e., inconsistent with the relation of mortgagor and mortgagee. The Subordinate Judge assuming the fact of the original mortgage, admits that there was some evidence on the record of payment of interest by the mortgagor, but he refuses to give any serious consideration to it, because he thinks that interest is not rent. Of course that position is entirely correct. But it was the undisturbed subsistence of the relation of mortgagor and mortgagee which might be indicated by the payment of interest which was the principal question in this matter, and it was an error on the part of the Subordinate Judge to consider that the payment of money

(1) *Brajanath Kundu Chowdry v. Kilatchandra Ghose*.

(2) 7 Moore's I. A., 323.

could only be of value as evidence of the continuance of that relation if it was paid by way of rent. By the nature of the case, in all probability, if the mortgagor was allowed to retain possession of the property, he would not pay a money rent for it, he would merely pay money by way of interest upon the mortgage debt.

It seems to us, therefore, on the whole, that the Subordinate Judge has taken a wrong view of the nature of the plaintiff's cause of action, and in consequence of the error thus committed, may have wrongly determined the issue of limitation. It becomes necessary for us, therefore, to reverse his decision, and to send back the case to the lower Appellate Court for retrial.

The costs of this appeal will abide the event.

Appeal allowed.

Before Mr. Justice Phear and Mr. Justice Morris.

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Dec. 3.

BINDA BIRSE (PLAINTIFF) v. LALLA GOPPENATH AND OTHERS
(DEFENDANTS).*

Attachment, Priority of—Act VIII of 1859, s. 270—Execution—Striking off Case—Money-decree.

A obtained a decree against C for possession and mesne profits, but no specific amount of mesne profits was then assessed. In 1864 A in execution of his decree attached land belonging to C, but the execution case was struck off the file in 1865. After several ineffectual proceedings A reattached the property in March 1869. In execution of a decree against C, B had in February 1869 attached the same property. The property was sold under A's attachment in May 1869, and on the application of A the Subordinate Judge, on the strength of A's attachment in 1864, gave priority to A's claim over that of B. The balance of the sale proceeds after satisfaction of A's decree were only sufficient to cover a small portion of the decree obtained by B. In a suit by B against A under s. 270, Act VIII of 1859, to recover the amount of her claim which remained unsatisfied,—*Held* that the attachment of A in 1864, on the strength of which A's claim was

* Special Appeal, No. 239 of 1872, against a decree of the Officiating Judge of Zilla Patna, dated the 4th September 1872, affirming a decree of the Officiating Subordinate Judge of that district, dated the 12th September 1871.

1872 considered by the Subordinate Judge to have priority over that of *was B*,
 BINDA BISEN not a sufficient and valid attachment under s. 270. The attachment
 v. contemplated by that section means an attachment after a final money-
 LALLA decree. *Held* also, that the striking off of the execution case of *A* in 1865
 GOPERNATH. caused an extinguishment of the effect of the attachment of 1864.

IN execution of a decree obtained by the plaintiff against one Chowdhry Ajrawul Sing certain property of the judgment-debtor was attached in February 1869 and sold on the 6th of May following. The Subordinate Judge, in consideration of an alleged prior attachment on the 10th of September 1864 of the same property by the defendants in execution of a decree obtained by them against Ajrawul Sing, first paid the entire debt of the defendants out of the sale proceeds and handed to the plaintiff the balance, which covered a small portion only of the claim. The plaintiff now sued to recover from the defendants the unsatisfied portion of her judgment-debt, averring that the attachment taken out by the defendants in September 1864 had become extinguished, and did not subsist at the date on which the property was sold, and that the plaintiff had a priority of title to the full satisfaction of her decree from the sale proceeds. The defence was that the attachment of September 1864 was in full force until the date of sale, and therefore the order of the Subordinate Judge, dated the 16th of August 1870, was good and valid.

At the hearing, it was proved that, after the attachment made in September 1864, the execution case of the defendants was struck off the file of the Court on the 16th of March 1865, in consequence of default on the part of the defendants; that, afterwards on the same day, an application was made by them for execution by a fresh attachment, which, however, was not granted; and that after several ineffectual attempts, the defendants only succeeded in reattaching the property in March 1869, after the attachment by the plaintiff in February 1869. The Court of first instance decreed the suit, holding that the application of the defendants for a fresh attachment was clearly an abandonment on their part of the first, and that, therefore, the plaintiff was entitled to prior satisfaction of her judgment-debt.

On appeal by the defendants, the Judge reversed this decree, and dismissed the suit, holding that the case was governed by the ruling in *Jhatu Sahu v. Ramcharan Lal* (1). The plaintiff appealed to the High Court.

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Moonshee Mohammed Yusuff for the appellant.

Baboos Sreenath Dass and Mohesh Chunder Chowdry for the respondents.

Moonshee Mohammed Yusuff contended that, under the words of s. 270 of Act VIII of 1859, the plaintiff was clearly entitled to have her judgment-debt satisfied first, as being "the person on whose application the property was attached." The attachment of the defendants in 1864 was not only infructuous, but its effect had become extinguished by the striking off their execution case at that time. The actual attachment under which the defendants sold this property took place in 1869, which was subsequent to plaintiff's attachment.

Baboo Sreenath Dass contended that the defendants were entitled in equity to benefit by the prior attachment in 1864; and that the requirements of the Act were satisfied by the former proceeding. The case was clearly governed by the ruling in *Jhatu Sahu v. Ramcharan Lal* (1).

Moonshee Mohammed Yusuff in reply.

The judgment of the Court was delivered by

PHEAR, J.—With reference for the view taken by the Judge of the lower Appellate Court in this case, it appears to us that the plaintiff has certainly, on the facts found by both the Courts below, established her claim against the defendants. The s. 270 of the Civil Procedure Code says, that, when a sale of the attached property takes place, the proceeds shall be applied to the satisfaction of the decree of the person who first attached. And it has been held by a Full Bench of this Court that these

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words give the person who first attached a right to sue any one else who may have been wrongly paid by the Court out of the proceeds in preference to him, in order to recover from such person the money which has been so paid (1). The plaintiff in this case says, that, although the property of a certain person was sold in execution on the application of the defendants, yet at that time she, the plaintiff, had a prior attachment, and was therefore entitled to be paid her debt out of the proceeds of that sale in priority to the defendants. The attachment upon which the plaintiff relies was made on the 16th of February 1869 ; and the last attachment, made by the defendants before they obtained the order of sale, was effected on the 9th March 1869. We speak of it as the last attachment, because there was certainly another attachment made at the instance of the same persons previously, i.e., so early as September 1864, and there appears to have been between these two dates an abortive attempt to get the Court to attach the property on another occasion.

If the attachment effected by the plaintiff on the 9th March 1869 was the actual commencement of the attachment which was subsisting when the defendants sold, then clearly the defendants' attachment is subsequent in date to that of the plaintiff. But the defence is that the attachment of September 1864 was a good and valid attachment within the meaning of s. 270 of the Civil Procedure Code, and continued unbroken in force up to the 9th of March 1869, when the second attachment was made, and further continued in force down to the time when the sale was made :—in other words, the attachment of the 9th of March 1869 was altogether an useless and unnecessary act on the part of the Court. But we find upon looking to the facts which are presented to us by the lower Courts, that the attachments of September 1864 was a general attachment made after a certain decree for possession, and mesne profits had been passed in favor of the present defendants, but before the mesne profits had been estimated or assessed.

The petition for attachment did not specify any sum of money

(1) *Gogaram v. Kartick Chunder Singh*, B. L. R., Sup. Vol., 1022.

in respect of which the attachment was sought. And in truth, no such specification was possible, unless it was confined to a certain amount of costs, for at that time there had been no final decree—no final money-decree—passed. The present defendants, in that suit in September 1864, had only obtained a decree for possession of certain immoveable property, and a right to have the mesne profits assessed in the execution proceedings. Until those mesne profits were assessed, clearly there was no final money-decree passed in their favor. There was no decree which they were in a position to call upon the Court to execute and to realize in the shape of money. And as it happened, either by reason of their own dilatoriness or by the delay of the Court itself, they did not get a final decree or assessment of any specific amount of mesne profits until the year 1866. So that, up to the year 1866 at any rate, they were not in possession of a decree for money which they could execute. Now the Full Bench decision, in the case of *Sri Rammanik v. Tincowri Rai* (1), distinctly lays down that the word “attached” in s. 270 means “attached in execution of a decree within the meaning of Ch. iv of the Code:” that is, obviously, as we think, execution of a decree which is a final decree for money, and which is capable of being completely executed at the time when the attachment is asked for and made.

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The late Chief Justice in that case pointed out various inconveniences and anomalies which would occur, if the attachment spoken of in s. 270 were construed so as to include attachment effected before decree. And we need hardly remark that every one of those inconveniences and anomalies would manifestly present themselves here if the interpretation, which the present respondents desire us to put upon this word attachment, was adopted. An attachment before the final assessment of the mesne profits was made would be exactly in the same situation, as regards the Chief Justice's arguments, as attachment before a final money-decree was passed. It seems, therefore, very plain that the reasoning upon which the Full Bench placed its decision in that case obliges us to hold that an attachment

(1) 4 B. L. R., F. B., 63.

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made pending execution proceedings in the case of a decree for possession and mesne profits not assessed, is not an attachment such as is contemplated by s. 270. This being so, we think that the lower Appellate Court was wrong in holding that the defendant's attachment of September 1864 was an attachment within the meaning of that section prior to the present plaintiff's attachment, and therefore gave them, the defendants, a right to the money. At any rate it could only give them such a right to the extent of the costs which were awarded to them in their first decree. But, although those costs were included in their application for attachment, it is clear that that attachment was not sought with a view to obtaining execution of the decree so far as it was then capable of being executed by realization of the amount of those costs, but for the purpose merely of keeping the property within reach of the Court and available for satisfaction of the amount of mesne profits as soon as that amount should be ascertained.

But, however, this may be, we think that there is another even more complete obstacle to the maintenance of the right set up on the part of the defendants, because we think that it is beyond question in this suit, on the facts which have been found by both the lower Courts, that the attachment of September 1864, whatever was its value, was at an end,—altogether at an end,—and removed, before the attachment of the 9th March 1869 was effected. We observe in the first place that, on the 16th March 1865, in the course of the execution proceedings of the former suit, that is to say the suit in which the present defendants had obtained their decree, both parties had notice to appear before the Court in the matter of those execution proceedings, for the hearing and final determination thereof. But inasmuch as notwithstanding that notice, the present defendants failed to appear, the Court struck off the case. That act by itself can scarcely under the circumstances bear any other meaning than that the Court thereby effected a complete termination of the case: if we knew nothing more than this of the matter, the order then made must be taken to have had the effect of removing the attachment and putting an end to the execution proceedings altogether. No doubt at a later

hour in the course of the same day, the present defendants did come into Court, and induced the Court to restore the proceedings, but no order seems to have been made at that time to the effect that the attachment also should be restored.

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However this may have been at that time we need not now greatly trouble ourselves to ascertain, because we find that nearly three years afterwards, namely on 25th January 1868, the present defendants applied to the Court again in those very execution proceedings in order to get satisfaction of the complete decree for mesne profits, which they had then obtained, by the sale of certain specified property, belonging to the judgment-debtors, which we understand was the property, or part of the property originally attached and the subject of the final sale. On this application, the Court, in the exercise of the discretion which it was bound to apply to the matter, acted as if there was no attachment at that time subsisting. It expressly said that there was no attachment subsisting, and by an order made on the 6th February 1868 called upon the applicants to pay *tallabana* fees for effecting the necessary attachment. This the applicants, i.e., the present defendants failed to do, and accordingly on the 18th of the same month the case was struck off. Ten months after this, again the present defendants did apply for a fresh attachment, namely on the 31st December 1868, the attachment was made on the 9th March 1869. And it was upon that attachment so following upon that application that the sale-proceedings eventually took place. That suit is not now before us; the parties in this appeal are not the parties to that suit; we cannot now review what was done in that suit; it would be beyond our jurisdiction to say that the order of the Court in those execution proceedings was a vain order or a wrong order.

We are not here called upon to satisfy ourselves as to what was the effect of some doubtful, or ambiguous proceeding on the part of the Court which was charged with the execution of the decree in that case. We have no such question before us as that very common one, whether or not the Court by striking the execution proceedings off its file meant to terminate them altogether and to remove the attachment. We have

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before us the express finding of the Court that there was no subsisting attachment, and the order which it made thereon. We must take it that it was a right order between those parties, that the judgment-debtor's property in that suit was not attached before the 9th March 1869. So that it appears to us there is really no occasion as between the present parties to enquire what was the effect of the earlier proceedings of September 1864, and so on. All that matter has been put at rest. There was clearly no attachment subsisting at the instance of the present defendants in the suit, and immediately before the 31st December 1868. And consequently, as has already been remarked, if that be the case, the present plaintiff's attachment was within the meaning of s. 270. and was indisputably a prior attachment. The plaintiff is, therefore, in our opinion, upon the facts of the case as stated by the lower Appellate Court, entitled to recover in this suit. The Munsif held that she was so entitled, and the Munsif's decision was therefore right, and the lower Appellate Court's decision was wrong in law. We, accordingly, reverse the decision of the lower Appellate Court and affirm that of the Munsif.

The appellant will have her costs in this Court and in the lower Appellate Court.

Appeal allowed.

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March 3.

Before Mr. Justice Jackson and Mr. Justice McDonell.

IN THE MATTER OF THE PETITION OF SAMUEL COCHRANE.*

*Superintendence of High Court—24 & 25 Vict., c. 104, s. 15—
Circumstances disentitling Party to Relief.*

A party applying to the High Court for relief under s. 15 of 24 and 25 Vict., c. 104, must clearly show that he has not contributed by his own conduct to his being placed in the position he finds himself in.

A decree for possession with mesne profits of certain lands appertaining to an indigo concern was obtained in a suit against D as manager on behalf of G. M. and Co., the proprietors of the concern, although no member of G. M. and Co. was living when the suit was instituted. In execution of this decree the plaintiff obtained possession of the lands. The executors of M., the last

* Rule, No. 1160 of 1874, against an order of the Subordinate Judge of Jessore, dated the 19th September 1874.

surviving member of G. M. and Co., having subsequently assigned the concern to A, who also took upon himself the *dena pana*, the plaintiff applied under s. 210, to execute the decree against A in respect of wasilat; and two successive notices under s. 216 were issued to A to show cause why the decree should not be executed against him. A being advised that the suit was a nullity, and that under no circumstances could execution be had against him as heir or legal representative of any of the judgment-debtors, neglected to appear, and certain property belonging to him was sold in execution of the decree without opposition on his part, and the sale having been duly confirmed, the purchaser, who was also the decree-holder, was put into possession. A thereupon applied to the Court executing the decree to have the sale set aside, and his application being refused, petitioned the High Court under s. 15 of 24 and 25 Vict., c. 104, for the same relief. The High Court, however, refused to interfere both upon the principle above stated, and likewise because the purchaser, being also the decree-holder, could not successfully oppose a suit by A to have the sale set aside.

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On the 29th March 1866, the husband of Maharani Brojo Soonduree Dabia instituted a suit against H. Deverine as mahager on behalf of Messrs. Gilmore, McKilligan and Co., the proprietors of the Paikardanga Indigo Concern, to recover possession of certain lands appertaining thereto with wasilat. The Paikardanga Concern had been mortgaged in 1861 by Gilmore, McKilligan and Co., to the Agra and Masterman's Bank, and the Bank under the terms of its mortgage entered into possession in 1866. At the date of the institution of the suit, no member of Gilmore, McKilligan and Co., was alive; the suit, however, was defended, apparently by the Bank. In December 1866 a decree was given in the plaintiff's favor; and subsequently in execution of that decree, the Maharani obtained possession of the lands sued for, and the execution case was then struck off the file. In 1869 the executors of J. P. McKilligan (the last surviving member of Gilmore, McKilligan and Co.) sold the equity of redemption of the Paikardanga Concern to the Agra Bank, the conveyance stipulating that the Bank should take over the *dena pana* of the concern. Thereafter the Maharani applied to the Court, under s. 210, Act VIII of 1859, to execute the decree in respect of wasilat against the Agra Bank as the representative of Gilmore, McKilligan and Co., upon the ground that the Bank had undertaken the *dena pana*. A notice was thereupon issued under

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s. 216, calling on Mr. Cochrane, the manager of the Agra Bank, to show cause why the decree should not be executed against the Bank. The notice was duly served, but Mr. Cochrane failed to appear, and consequently the amount of mesne profits was ascertained in his absence. Nothing further was then done, but at a later period the Maharani again applied to execute the decree against the Bank by levying the amount which had been assessed. Another notice to Mr. Cochrane was issued but he again did not appear, whether in consequence of the notice not having reached him, or of advice received by him, was not certain. At any rate a patni talook called Matra, belonging to the Bank, was attached, and afterwards sold without opposition on the 1st June 1874; the sale was confirmed on the 1st July following and on the 2nd August, the Maharani, who was herself the purchaser, obtained possession.

Thereupon Mr. Cochrane applied to the Subordinate Judge, in whose Court the execution proceedings had taken place to have the sale set aside, and for an injunction restraining the plaintiff from further proceeding under the decree against the Bank or its property. The application was based on the following amongst other grounds, viz., that the suit was wrongly instituted, not having been brought against the executors of McKilligan; that the applicant was justified in disregarding the notices to show cause both on that account, and because the Bank was not the heir or representative of the defendants or any of them; that he had been advised that the proper time to apply in the matter would be upon the actual attachment or sale of any of the Bank's property; and that the Bank first received information of the attachment and sale of Matra in the middle of July, and was until then wholly ignorant of such attachment and sale, or that the decree had been revived against the Bank.

This application was refused by the Subordinate Judge on the ground that more than thirty days had elapsed since the date of sale; that in his opinion the Bank became liable under its contract taking over the *dena pana*; and that even assuming this view to be wrong, the Bank should have objected within the time limited by the notices which he considered were good in law.

The Bank thereupon applied to the High Court, under s. 15 of 24 and 25 Vict., c. 104, and obtained a rule calling on the decree-holder to show cause why the order of the Subordinate Judge should not be set aside, and the prayer of the Bank be granted.

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Mr. *Kennedy* (Baboo *Mohesh Chunder Chowdhry* with him) showed cause.

The *Advocate-General* offg. (Mr. *Paul*) and Mr. *Woodroffe* in support of the rule.

Mr. *Kennedy*.—The Bank was in possession of the Paikaranga Concern while the suit by the decree holder's husband was being carried on, and yet professes to have been wholly ignorant of the proceedings in the suit. If the Bank was first injured by the dispossession, it might have brought a regular suit to set aside the sale. Having taken upon itself the *dena pana* of the concern, it was in one sense the representative of the judgment-debtors.

The Court here called on the *Advocate-General* to support the rule.

The *Advocate-General*.—S. 210, Act VIII of 1859, provides that when a person against whom a decree is made shall die before execution, execution may be had "against the legal representative or the estate of the person so dying." With reference to this, Mr. Macpherson in his work on Civil Procedure (5th ed.) p. 265, says: "under certain circumstances execution may issue against one who is not the legal representative in the sense of being the heir, executor or administrator of the deceased;" but the cases cited in support of that proposition—*Lalla Poorihit Lall v. Mussamut Sabeerun* (1) and *Doorga Soondures Debea v. Soorjoo Monee Debia* (2)—scarcely bear it out. In *Macleod v. Kunhye Sahoo* (3), the purchaser of a share in an indigo factory and of the *dena pana* thereof was held not to be the legal representative of the former owner within s. 102, Act VIII of 1859. There was no evidence before the Sub-

(1) 7 W. R., 368

(2) 8 W. R., 101.

(3) 9 W. R., 271.

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ordinate Judge to show that the Bank was the legal representative of the judgment-debtors: there was, therefore, no foundation for the notice issued under s. 216, and the Bank was justified in treating it as a nullity. A mortgagor suing his mortgagee for redemption and an account may, on the death of the mortgagee pending the suit, make the assignee of the mortgagee a party under s. 73; but he could not execute a decree obtained against the mortgagee against the assignee of the mortgage; he would be forced to bring a regular suit. So in the present case, if the Bank be liable by reason of its having taken over the *dena pana* account, such liability can only be enforced by suit; see *Kearnes v. Bhawani Charan Mitter* (1). But the mere taking over of the *dena pana* does not amount to taking over all the liabilities of the assignor, including, amongst others, his personal liability for trespasses committed by him. A decree in a suit against a man as manager on behalf of others will not affect the principals. Lastly all the members of the firm of Gilmore, McKilligan & Co. being dead at the time the suit was instituted against them, the decree cannot be executed against their legal representatives — *In re Girendronath Tagore* (2).

Mr. Kennedy was not called upon to reply.

(1) B. L. R., Sup. Vol., 54.

(2) *Before Mr. Justice Bayley and Mr. Justice Mackpherson.* Baboo Sreenath Dass and Obhoy Churn Bose for the Opposite Party.

IN THE MATTER OF THE PETITION OF
GIRENDRONATH TAGORE AND
OTHERS.*

The 15th December 1868.

Act VIII of 1859, s. 210—Execution
of Decree passed against Deceased
Person.

When a decree has been passed against a deceased person, execution of such decree cannot be had under the Civil Procedure Code against his legal representatives.

Mr. R. T. Allan and Baboo Taruck Nath Dutt for the Petitioners.

MACPHERSON, J.—I think this rule ought to be made absolute so far as regards quashing the execution proceedings which have been taken against the petitioners as the legal representatives of Girendronath Tagore, deceased.

A decree was obtained by Hurronath Roy in the Sudder Court on the 23rd February 1861, against Madhub Chunder Chowdhry, Girendronath Tagore, and others. The plaintiff in that suit, Hurronath Roy, or his representatives, recently applied to

* Rule, No. 1228 of 1868, against an order of the Subordinate Judge of Pubna dated the 23rd February 1861.

The judgment of the Court was delivered by

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JACKSON, J., (who, after shortly stating the facts, continued).—It is a rule which we have always observed in affording

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the Court of the Subordinate Judge of Puna for execution of that decree, against the present petitioners as the legal representatives of Girendronath Tagore. Upon this application being made, notice was issued by the Court under s. 216 of Act VIII of 1859, calling upon the present petitioners to show cause why the decree should not be executed against them. They thereupon showed cause, and the cause shown was this:—that although the name of their father Girendronath Tagore appeared as a defendant in the decree of the 23rd February 1861, and throughout the whole of the proceedings in that suit, Girendronath Tagore had in fact died on the 19th December 1854, some fifteen or sixteen months before the plaint in that suit was filed. The present petitioners therefore contended before the Subordinate Judge, and as it seems to me very reasonably, that as the suit was instituted against a dead man, and as the decree was obtained against the same dead man so long ago as 1861 the decree was practically worthless, and they were not now liable under that decree as his legal representatives, especially as they never had any notice of the proceedings in that suit until the application for execution was made against them. The decree of which execution was sought was the decree of another Court, so the Subordinate Judge did not himself dispose of the question whether execution should or should not issue; but postponed the further hearing of the matter, and gave the parties leave to apply under the provisions of s. 290, Act VIII

of 1859 to the Court which made the decree. Thereupon the petitioners apply to this Court to quash the whole proceedings taken by the decree-holder against them, upon the ground that they are in no possible way liable under the decree of February 1861, and that the lower Court has no jurisdiction to entertain the application against them. There is some confusion, and possibly irregularity in the way in which the matter is brought before this Court, and some misapprehension as to the remedy to which the parties are entitled. But the substantial case made by the petitioners, and one of their prayers, is that the order for the execution may be quashed on the ground of the petitioners' being in no way liable under the decree of February 1861.

Upon the merits, we must take it that the petitioners' case is made out. In moving for the *rele nisi*, which was obtained on the 25th of August last, the petitioners made use of an affidavit sworn to by one of the members of their family in which the grounds of the application are distinctly set forth; and in this affidavit it is sworn that Girendronath Tagore died before Hurronath's suit was even instituted. That affidavit, although filed in August last, has not been contradicted or answered in any way. Therefore, for the purposes of the present application we must consider the facts stated therein to be true. As it is established that Girendronath Tagore, the person against whose legal representatives the decree is now sought to be executed, died before any decree was passed, it ap-

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relief to parties applying to this Court under s. 15 of the High Courts' Act, that it must be made quite clear that the party applying for it has not contributed by his own conduct to his being placed in the position he finds himself in. Now it is quite clear that Mr. Cochrane had the fullest opportunity on two

pears to me that execution cannot be issued; for no provision is made in the Code of Civil Procedure for the issue of execution against the legal representative of a deceased defendant in such a case. S. 210 of Act VIII of 1859 is the section which declares when execution may be issued against the legal representatives or the estate of a deceased judgment-debtor. The words of that section are:—"If any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be made against the legal representative or the estate of the person so dying as aforesaid." These words do not embrace a case like the present, because they evidently contemplate only the case of a person who, being alive at the time when a decree is passed against him, dies before execution is fully had of that decree. The section does not include or provide for the case of a person against whom a decree is made having died before the decree is made. And it is little to be wondered at that the Code does not provide for such a contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men. There is no other section in the Code of Civil Procedure, excepting s. 210, under which a decree-holder is empowered to apply for execution against the legal representatives of a deceased judgment-debtor; and as s. 210 does not (as I have shown) apply to the present case, this decree cannot

be executed against the legal representatives of Girendronath Tagore. I think [therefore all the proceedings taken against the petitioners in execution of the decree of February 1861 ought to be quashed; and that the petitioners are entitled to their costs of this application.

BAYLEY, J.—I am of the same opinion. S. 210 of Act VIII of 1859 is as clear as words can make it that if a party against whom a decree is made dies before execution is fully had of that decree, application for execution may be made against the legal representatives of the deceased.

In this case however there was an affidavit and a petition of objection setting forth that Girendronath Tagore died even before the institution of the suit, and nothing has been adduced by the opposite party to show that the facts stated in the affidavit and in the petition of objection are incorrect, although there was ample time for this being done. I therefore may legally assume the facts stated in the above papers to be correct. Girendronath thus was not a party against whom a decree was made; therefore under the terms of s. 210, Act VIII of 1859, the execution proceedings could not be legally taken by the decree-holder against the defendants as representatives of Girendronath.

I concur in the order proposed to be passed by Mr. Macpherson J. in this case.

occasions of appearing before the Court and showing cause against the acts he complained of. He abstained from doing so under advice. The learned Advocate-General contends that he was perfectly justified in so abstaining, inasmuch as the acts of the Court were absolutely null. It appears to me that acts of the nature complained of, when done after notice to the party affected by them, cannot be regarded as nullities so as to enable the petitioner to take the position that he was absolved from the necessity of taking notice, and entitle him to apply to this Court for setting aside the sale : and the clearer the ground on which the acts complained of are said to be bad and erroneous, the easier his course was to come before the Court and induce it to stay its hands. It may be that notwithstanding what I have said, we should have been inclined to allow the petitioner before us the relief he seeks in the present form, if we saw reason to think that a suit for setting aside the sale would not be successful ; but it appears from the papers that the party who purchased at the sale is the decree-holder, the party who set the Court in motion. There can be no doubt I think that the decree-holder herself having been the purchaser cannot, if the petitioner's allegations be true, successfully contend that a suit to set aside the sale would not lie. Under the circumstances I think that the petitioner is not entitled to have the relief asked for, and that this rule should be discharged with costs.

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Rule discharged.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson.

GOBIND CHUNDER MOOKERJEE (PLAINTIFF) v. DOORGAPERSAD
BABOO AND OTHERS (DEFENDANTS).

1874
May 20 & 21,
and June 25.

*Vendor and Purchaser—Notice—Joint Hindu Family—Presumption of
Joint Estate—Nucleus—Relief.*

When a person has notice that another has or claims an interest in property for which he is dealing, he is bound to enquire what that interest is ; and if he purchases without doing so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest.

Where the notice is given by the person himself who claims an interest in the property, and it is afterwards proved that he had such an interest,—*Quære* whether any amount of enquiry can discharge the purchaser from liability.

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Presumably every Hindu family is joint in food, worship, and estate: and this presumption applies in the absence of any evidence of a nucleus of joint property, and even without evidence that the family is undivided. A purchaser, therefore, from one member of a Hindu family is affected with notice of the claims of the other members.

Although the plaintiff was found not to be entitled to the special relief prayed for, the Court considered he had established a case, in which, upon the plaint and the general prayer for relief, he was entitled to a decree (1).

On the facts *Held* (reversing the decision of the Court below) that no sufficient enquiry had been made in this case.

APPEAL from a decision of Pontifex, J., dated the 20th February 1874.

The material facts of the case are sufficiently stated in the judgment appealed from.

PONTIFEX, J.—In this case, one Gobind Chunder Mookerjee sues to set aside a sale to the principal defendant of a certain decree which stood in the sole name of Hurriah Chunder Mookerjee, the brother of the plaintiff. I may say at once that I think that there is not the slightest evidence that the purchase of the decree by the principal defendant was in any way dishonest. There has not been any attempt to show that Rs. 9,000 which he states that he gave for the decree was not paid; nor that the Rs. 9,000 was not the fair value of the decree at the time when it was sold. Except therefore for any legal doctrine of notice, if the plaintiffs case be proved, this would be a contest between two innocent parties. The plaintiff in his plaint claims that he is entitled to an absolute interest in the decree which has been sold, and asserts that his brother Hurriah Chunder held it for him, and for him alone, benami. The decree was granted under the following circumstances. The plaintiff alleges that in 1842 he lent certain Chowdhrys Rs. 14,000; that in 1843 they confessed judgment in the late Supreme Court; that such judgment was confessed in the name of Hurriah Chunder and a certain jurisdiction trustee, who has since died: that various proceedings in execution of decree were taken out, some of which only were fruitful, and those only to a slight

(1) See *Hiralal Mullick v. Matilal Mullick*, 5 B. L. R., 682; and *Virasvami Gramini v. Ayyasvami Gramini*, 1 Mad. H. C. Rep., 471.

extent; that subsequently the decree was transferred from this Court to the Court of the 24-Pergunnas; that execution was taken out in the 24-Pergunnas, and some Rs. 1,000 or 1,500 were realized since such transfer. The plaintiff in his evidence attempted to prove that he is solely and absolutely entitled to the decree, but admissions were drawn from him in cross-examination, which, in my opinion, show clearly that the decree did not belong to the plaintiff alone, but that, if it was not the separate property of Hurriah Chunder, it was part of the joint family property. The plaintiff has admitted that when he was in Assam many years ago the whole of the interest on the judgment-debt was drawn by his father, and was applied for the expenses of the joint family-house. Moreover, in the plaint he admits that some time before the sale of the decree, the other members of the family insisted on having a share in it; that the matter went to arbitrators, and that the arbitrators allowed each of his brothers a certain share in the decree. I think also that the statement of the plaintiff that he was absolutely interested in the decree is disproved by the letter of his solicitors of the 13th June 1872 (1). I cannot conceive that, if the plaintiff had instructed his solicitor that he was solely entitled to the decree, his solicitor would in the letter which he wrote to Mr Paliologus, the defendant's solicitor, have only stated that "Hurriah Chunder is not the absolute owner of the said judgment, and cannot claim the whole money realizable under it."

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The plaintiff in his plaint has stated that before the sale of the decree,—viz., on 10th June 1872,—he went to the defendant's kothi, and there saw the defendant and his gomasta Ram-

(1) This letter was in the following terms:—"Dear Sir,—Baboo Gobind Chunder Mookerjee having been informed that some client of yours has engaged with Baboo Hurriah Chunder Mookerjee for an absolute assignment of a certain judgment of the Supreme Court, standing in his name against the representatives of Roy Mathooranath Chowdhry and brothers, sent for execution to the Court of the Judge of Alipore, as the absolute proprietor of the money realizable under the said

judgment has instructed me (who was acting in the matter of the revival of the judgment and of sending it out for execution) to inform your client through you that Baboo Hurriah Chunder Mookerjee is not the absolute owner of the said judgment, and cannot claim the whole money realizable under it, and that your client purchasing the decree from Baboo Hurriah Chunder Mookerjee will do it at his own risk and peril."

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nath. Although in his written statement the defendant apparently admits that he was present on that occasion, I am disposed to think that the defendant himself was not present, and that Ramnath alone was present. It appears to me, however, to be immaterial whether the defendant was present or not, because the whole transaction relating to the sale of the decree was conducted by Ramnath alone on behalf of the defendant. The plaintiff in his plaint states that on going to the defendant's kothi he gave notice of his claim as stated in the plaint,—namely, that he was the absolute owner of the decree. I do not believe his claim was so stated to Ramnath. The defendant in the 8th paragraph of his written statement has made a very fair admission of what took place on that occasion (1). He states that the plaintiff informed his gomasta that “he, the plaintiff, was the brother of the said Hurriish Chunder Mookerjee, and as such was entitled to a share in the consideration-money; and that he must have some of the money which was to be paid to the said Hurriish Chunder Mookerjee; and threatened that, if he did not give some of the money, he would raise objections to the sale of the judgment.” I believe that that statement is a correct statement of what took place. It corresponds exactly with the subsequent letter of the plaintiff's solicitor to Mr. Paliologus. I take it therefore to be the fact that the plaintiff, on that occasion only claimed a share in the purchase money, and that he did not object to the sale itself or to the price which was to be given. If so, he would not be entitled to set aside the sale except that, as to any interest

(1) 8th paragraph of the written statement of the defendant Doorga-persad Baboo :—“On the 9th or 10th of the said month of June, the plaintiff called at the defendant's kothi, accompanied by Rajcoomar Banerjee. This was the first time this defendant or his gomasta ever heard of the plaintiff; and he the plaintiff and the said Rajcoomar Banerjee then stated to the said gomasta that he, the plaintiff, was the brother of the said Hurriish Chunder Mookerjee, and as such was entitled to a share in the consideration-money; and that he must have some of the money which was to be paid to the said Hurriish Chunder Mookerjee; and threatened that, if he did not give some of the money, he would raise objections to the sale of the judgment. The defendant's gomasta then and there told the plaintiff that he would not give him a pice, and that, if he had any rights in the matter, he should petition the Court, and suggested to him to do so, and told him that the deed” (of assignment to the defendant) “was not signed, which however as this defendant believes the plaintiff well knew”

which he might have, he would to that extent be entitled to a share of the purchase-money given on the sale.

Now the defendant's admission in paragraph 8 of his written statement is, I think, sufficient of itself to affect him with notice. It is immaterial whether the plaintiff claimed on that occasion to be absolutely entitled to the decree or only to a share in the money, for the notice would be sufficient if it was enough to excite attention and call for enquiry on the part of the defendant. In one case it was held that notice of a claimant having a judgment or warrant of attorney affecting the estate was sufficient, although the claimant could only substantiate his claim as a mortgagee. I think therefore that the statement in paragraph 8 of the defendant's written statement is sufficient to affect him with notice of the plaintiff's claim. Therefore the question arises did the defendant properly pursue the reasonable enquiry which he was bound to make after notice? And if he did not, whether such reasonable inquiry, if he had properly pursued it, would have led him to discover that Hurrish Chunder was not the absolute owner of the decree? It appears from the 8th paragraph of the defendant's written statement and from Mr. Paliologus's letter (1), that both the defendant and Mr. Paliologus were of opinion that where a claimant gave notice of his claim, the purchaser was not bound to make any enquiry at all, but it was the duty of the claimant to establish his claim. That appears to me to be a misconception of the law. An intending purchaser is bound, when he has had notice given him, to make reasonable enquiry; and if he does not do so, he must submit to the same consequences as if he had properly made the enquiry. But, on the other hand, I think that, if such reasonable enquiry

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(1) The material portion of this letter, which was in answer to the letter written by the plaintiff's attorney on the 13th June 1872, was as follows:—"I believe the party who has gone to you has been instigated to oppose Hurrish Chunder Mookerjee, because he would not yield to certain extortionate demands made by two other persons, and it certainly is most strange that, although I have reason to believe your present client has been

for the last three or four days aware that the deed has not been completed, he has not thought fit to make known his claims to the 24-Pergunnas' Court. I was told at 11 this morning that the deed would be completed to-day at the 24-Pergunnas' Court, which I have no doubt your client is fully aware of. It was his duty to have adopted measures before the proper tribunal to prevent it if he really has any right in the matter."

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would not disclose the fact of the claimant having any interest, the purchaser would not be affected by a mere statement of a person giving notice that he claimed an interest on the estate. The whole of the proceedings against the Chowdhrys have been put in in this suit, and Mr. Bonnerjee, for the plaintiff, has argued that after notice had been given, it was the duty of the defendant to go through the whole of these proceedings; and that if the whole of the proceedings had been inspected, it would have appeared from the affidavits which were filed in the execution proceedings that the plaintiff was at least jointly interested with Hurrish Chunder in the decree. But it further appears that after the decree had been transferred from this Court to the 24-Pergunnas, the judgment-debtors came to an agreement with the decree-holder, that the debt should be taken at Rs. 13,000, and should be paid by instalments. It has not been shown to me that in any of the proceedings subsequent to that agreement (or in the agreement itself) there is any statement or reference which would have led a purchaser to suppose that Hurrish Chunder was not the absolute owner of the decree. The very fact that Hurrish Chunder alone made this agreement with the mortgage-debtors would go a long way to persuade the defendant that Hurrish Chunder was alone interested in the decree. When I say there is no document subsequent to the agreement which could lead a purchaser to suppose that Hurrish Chunder was not the absolute owner of the decree, I am not sure I am correct. Execution proceedings were taken out by Hurrish Chunder against the Chowdhrys, who put in a petition alleging among other grounds why Hurrish Chunder alone should not be allowed to proceed with the execution, that Hurrish Chunder was not the absolute owner of the decree, but that he was a member of a joint family, and therefore he ought not to be allowed to execute the decree solely. The application went before Mr. Beaufort, the Judge of the 24-Pergunnas, and that part of the application was dismissed as having no apparent show of reason. The allegation apparently was not supported by any evidence. Against that order a petition of appeal was presented to this Court, and that also was dismissed. If those proceedings took place after the agreement with the Chowdhrys reducing the debt to Rs. 13,000, I think the defendant might

fairly have supposed that the judgment-debtors had been put in motion by the brothers of the decree-holder, but as these allegations were in no way substantiated, he might have naturally considered that Hurrish Chunder was the absolute owner of the decree. I do not think that the plaintiff's mere statement that he was entitled to part of the purchase-moneys rendered it necessary for the defendant to go back further in the proceedings than the agreement, which was in fact a sufficient starting point of title. If, therefore, the defendant had made the enquiry, which, after the notice he received, he ought to have made, there is nothing in that portion of the record which he was reasonably bound to search which would have led him to suppose that Hurrish Chunder was not the absolute owner of the decree. But the defendant did not confine himself to the proceedings in Court. Ramnath has said that he made enquiry of Hurrish Chunder as to the claim of Gobind Chunder, and Hurrish Chunder assured him that he and Gobind Chunder were then, and had been long, separate, and that this decree was the absolute property of Hurrish Chunder. He further says, that he enquired of Kally Baboo, the vakeel who acted for Hurrish Chunder in the proceedings in the Court of the 24-Pergunnas, and that Kalee Baboo, told him that Hurrish Chunder was the absolute owner of this decree. I think these were all the enquiries which the defendant was reasonably bound to make. It would be impossible to carry on the affairs of the world, if transactions of this kind were not allowed to be completed after such enquiries as these. I think, therefore, that the defendant must be treated in the same manner as if he had searched the proceedings, and, being so treated, that he must be considered as a purchaser for valuable consideration without notice.

There is one part of the plaintiff's case which I cannot pass over. The plaintiff's own case is that he and Hurrish Chunder and his brothers were all members of a joint family living together in the same house. He admits that Hurrish Chunder remained an inhabitant of the house for a period of six months after the decree was sold. It became necessary, in order to prove the service of the summons on Hurrish Chunder, to show that the family-house was the dwelling-house of Hurrish

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Chunder at the time when the plaint was filed. No question whatever was put to the plaintiff throughout this case whether he asked Hurrish Chunder for his share of the Rs. 9,000. The only question put to him was whether or not he had been paid any share by Hurrish Chunder. If it was the fact that, after receiving Rs. 9,000, Hurrish Chunder proceeded to his native village, and came and resided in the house in which the plaintiff lived, and the plaintiff knew, as he must have known, that the sale had been completed, I think that the plaintiff was bound to show that he had taken some steps to enquire of Hurrish Chunder how the purchase-money was applied. The fact that no evidence was given to show that he made any enquiry of Hurrish Chunder, is sufficient to taint the plaintiff's case with suspicion. Under these circumstances, I think the suit should be dismissed altogether. The plaintiff will pay the costs of Doorgapersad on scale No. 2.

There is one other circumstance in the case which I must notice. Both in his plaint and in his evidence, the plaintiff has alleged that the reason why he took no proceedings to stay the sale of the decree was because Ramnath had promised he would not proceed with the sale. The evidence of his brothers is directly contradictory of that. They say that on the occasion of their visit to Ramnath, Ramnath said "I will proceed with the sale even if I throw the money into the river." And I consider it proved therefore that Ramnath made no promise by which the plaintiff was misled or deceived.

From this judgment the plaintiff appealed.

Mr. *Montriou* and Mr. *Bonnerjee* for the appellant.

Mr. *Lowe* and Mr. *Evans* for the respondent Doorgapersad Baboo.

The other respondents did not appear.

Mr. *Montriou*.—The learned Judge found that the respondent had sufficient notice of the appellant's interests, and was wrong in holding that he had made all the enquiries he was bound to make. The respondent knew that Hurrish Chunder was a

member of a Hindu family, and therefore if he bought without making enquiry he did so at his peril.

Mr. Evans for the respondent contended that the notice of his interest given by the appellant was insufficient, He cited *Shaw v. Foster* (1) and *Jolland v. Stainbridge* (2).

Mr. Montrieux in reply.

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Our. adv. vult.

COUCH, C.J.—The plaintiff in this suit and the second and following defendants, except the last, are the sons of Goluck Chunder Mookerjee, who died about the year 1858, leaving the plaintiff and those defendants and another son Okhoy Coomar Mookerjee surviving him; and the last defendant is the widow of Okhoy Coomar Mookerjee, who died about the year 1864. It appears that in December 1842, three persons, named Roy Bykuntanath Chowdhry, Roy Mothoornath Chowdhry, and Roy Preonath Chowdhry, executed a bond and warrant of attorney to confess judgment in the Supreme Court at Calcutta, the bond and warrant of attorney being in the names of the defendant Hurrish Chunder Mookerjee, and a person named Edward Hilder, who was called a jurisdiction trustee, and who has since died. They were given to secure the payment of Rs. 14,000, with interest at 12 per cent., and a judgment was entered up upon the warrant of attorney in the Supreme Court on the 21st of November 1843 for Rs. 28,001. The judgment-debtors having died, the last in November 1868, proceedings were taken to revive the judgment against their representatives. This having been done, and there apparently being no property within the jurisdiction of the Supreme Court upon which execution could be had of the judgment, the usual certificate was transmitted to the Judge of the Court of the 24-Pergunnas, in order that execution might be had by that Court. An agreement appears to have been entered into—by whom authorized it is not I think clear, but at least it has been recognized as a binding agreement between the judgment-creditor and the representatives—that part of the money due on

(1) L. R., 5 H. L., 321.

(2) 3 Ves., 478.

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the judgment should be remitted, and the remainder paid by instalments. This being the state of things, the defendant Hurrish Chunder Mookerjee entered into negotiations with the manager of the business of the first defendant, Doorga-persad Baboo, for the sale to the first defendant of the money secured by the judgment. And the case of the plaintiff is that, pending the negotiation and before the transfer of the judgment or order for execution had been effected in the Court at Alipore, the defendant received notice from the plaintiff that he was interested in it, and that Hurrish Chunder was not the sole owner of the money secured by it, but was a trustee for the plaintiff, and apparently also for other members of the family. It is uncertain upon the evidence what is the precise notice which was given by the plaintiff. I do not refer to the attorney's letter, because it is possible that it was not communicated in time to have the effect of a notice. But, on the other evidence, I think it is clear that the plaintiff did give to Ramnath, the defendant's agent or manager, notice that he was interested in the money. His own statement as to what notice he gave differs from that of his witnesses. Whatever he did tell Ramnath, I think it is clear that it was sufficient to oblige Ramnath, who must be taken as representing the defendant, to enquire as to what interest the plaintiff had. The general rule is that, if a person knows that another has or claims an interest in property for which he is dealing, he is bound to enquire what that interest is; and if he omits to do so he will be bound although the notice was inaccurate as to the particulars or extent of such interest. This is stated by Mr. Dart in his work on Vendors and purchasers, p. 794, quoting as his authority, *Gibson v. Ingo* (1).

The evidence in this case, although not altogether consistent, shows that enough was done to bring the first defendant within the operation of this rule. The effect of the notice is that the purchaser is bound to the same extent and in the same manner as the person was of whom he purchased. So that the first defendant would be bound to the same extent and in the same manner as Hurrish Chunder was, if he omitted to make the

(1) 6 Hare, 124.

enquiry. Did he then make such an enquiry as he was bound to make, and as would prevent the operation of the rule? There are no doubt some cases in which an enquiry might be sufficient. The Lord Chancellor, in *Jones v. Smith* (1) says there might be a case where the information coming from the vendor and being of such a nature that the intending purchaser was *bona fide* misled by it, he would not be bound by the rule. But here we have not a case of that description. The notice of the plaintiff's interest came, not from the vendor Hurrish Chunder, but from the plaintiff himself. What then was the enquiry which Ramnath, representing the first defendant, thought proper to make? We must assume that at least he was informed that the plaintiff and Hurrish Chunder, the person in whose name the judgment was, were members of a Hindu family, and were brothers. He must also be taken to have known the presumption of Hindu law which I will refer to presently. With this knowledge he enquires, according to the evidence, of two persons. One was the vakeel, who was employed in the execution proceedings in the Alipore Court, but who could not be expected to know anything of the original transaction of the bond and warrant of attorney; that took place many years before. There is nothing to show that the vakeel would know anything more than what he could gather from the proceedings that were put into his hands for obtaining execution upon the judgment in the suit in which Hurrish Chunder was the plaintiff and apparently the person entitled to the money. The vakeel might have told him that the plaintiff and Hurrish Chunder were brothers and members of a Hindu family. The other person of whom Ramnath enquired is the vendor himself, Hurrish Chunder. Of course, an enquiry of Hurrish Chunder whether the plaintiff's claim was founded in truth or not would be useless, because, being about to sell the judgment as his own property, he was not likely to tell the intending purchaser that it was not his, or that other persons were interested in it. It cannot be said that there was such an enquiry as was sufficient, supposing any enquiry would in such a case as this be sufficient to prevent the defendant from being bound. I am not aware of any authority,

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(1) 1 Phillips, 245, at p. 253.

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and I have not been able to find any, that where a notice comes, as this notice did, from the person who claims an interest in the property, the purchaser can discharge himself from liability, supposing it is afterwards proved that the person really had an interest in the property.

I have said that the defendant must be taken to have known what is the presumption of Hindu law. That is stated by the Judicial Committee of the Privy Council for the first time, as far as I am aware, in *Luzimon Row Sadasew v. Mullar Row Bayes* (1). Their Lordships there decided that in a suit for the division of the property of an undivided Hindu family, the whole of the property of each individual is presumed to belong to the common stock, and it lies upon the party who wishes to except any of it from the division, to prove that it comes within one of the exceptions recognized by the Hindu law. The suit was by a person claiming to be entitled to a share of the property as family property. And it was an appeal from a decision of Mr. Mountstewart Elphinstone when he was Governor of Bombay, to whom an appeal was then allowed. It is stated that the grounds upon which the claim was founded were, that "by the Hindu law until a division of a joint property or inheritance from the father is effected between the members of a family, the acquired fortune of each member falls into and belongs to the common stock, and is divisible accordingly."

Sir James Colvile, in *Sreemutty Jadoomonee Dassie v. Gungadhur Seal* (2), which is quoted in Baboo Shamaichurn Sircar's *Vyavastha Darpana*, 521, at near the end of his judgment, says:—"The question is always one of fact, though a fact determinable in the absence of evidence strong enough to rebut the presumption by the legal presumption that the property is joint." There is also a decision of the Sudder Court—*Gour Chunder Rai v. Harish Chunder Rai* (3)—to the same effect. It was there held that, in the case of an undivided Hindu family, their acquisitions will be presumed to have been joint till proved otherwise—the *onus probandi* resting with the party claiming exclusive right. These cases were not quoted by me in *Tarruck Chunder Poddar v.*

(1) 2 Knapp, 60.

(2) 1 Boul., 600.

(3) 4 Sel. Rep., 162.

Jodeshur Chunder Koondoo (1). I did not consider it necessary then to refer to all the decisions on this question, there being the judgments of the Privy Council which I quoted. The cases which I have now quoted may be added to them, and it is unnecessary in this case to quote again the decisions of the Privy Council which were quoted in the former case. But there is one case which it is necessary to notice. Pontifex, J., in a recent judgment in *Denonath Shaw v. Hurrynarain Shaw* (2) refers to the case of *Umritsnath Chowdhry v. Goureenath Chowdhry* (3) and says, that "it was an appeal from the unreported decision of Kemp and Pundit, JJ., who had held that in that case the mere fact of commensality was not sufficient evidence of the being joint in estate, and that it was necessary to ascertain whether the nucleus of the estate was originally joint or separate: and although the Judicial Committee did not go strictly into the question, they say at p. 550:—"Both these cases of family and local custom, the burden of which was entirely on the defendant, have failed, and that brings it back to the case which the plaintiffs below had to prove,—that is, the simple fact that this was ancestral property of their common grandfather. That being so, and it being substantially admitted that there was no other source from which the acquisition could be made, the decree of the Court below seems to their Lordships to be right." The learned Judge then says:—"If the true doctrine is that an estate conveyed to an individual member of a family will, in the absence of proof to the contrary, be presumed to be joint with out any evidence of a nucleus of joint property, then it is difficult to understand why the Judicial Committee should have relied on a substantial admission."

I agree that if we had no other judgment on this subject than the passage which is quoted by Pontifex, J., it might be supposed that their Lordships thought it was necessary that there should be some evidence of a nucleus of joint property. But we must look at the other judgments of the Judicial Committee, and I cannot from this passage infer that their Lordships intended to lay down a rule opposed to what had been laid down

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(1) 11 B. L. R., 193.

(2) 12 B. L. R., 349.

(3) 13 Moore's I A., 542; S. C., 6 B. L. R., 232.

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and acted upon by them in various cases. All that it amounts to is that there being this admission, their Lordships thought it strongly supported the presumption. In many cases, probably in most, there are facts in evidence which support the presumption ;but it does not follow from this that the presumption is not to have effect in the absence of any such evidence.

In these decisions I do not find it anywhere laid down that the plaintiff need give any other evidence than that there is an undivided Hindu family. The presumption then applies. Nor need he in fact give evidence that the family is undivided, although it is advisable to give it when it is possible to do so ; and so it is to give evidence that there was family property from which the acquisition could be made in anticipation of evidence that may be given to rebut the presumption. It is laid down by the Judicial Committee in *Neelkristo Deb Burmono v Beer Chunder Thakoer* (1), and the same doctrine is stated in Strange's Hindu Law, that presumably every Hindu family is joint in food, worship, and estate. This is the presumption, but of course the evidence may rebut it, and may throw upon the person who asserts that the family is joint the necessity of giving some proof of it.

Therefore it appears to me that the first defendant was fixed with such a knowledge as showed that at least the plaintiff was entitled to a share of this property ; that it was property which Hurriah Chunder was not entitled to deal with as solely his own, because no facts appeared or were proved which show that Hurriah Chunder was so entitled.

Then the question is what decree ought to be made in this case. The plaintiff put forward a case which is not proved. His case was that the money was his own, and that Hurriah Chunder was not representing the joint family, but was representing the plaintiff only. He has failed to prove this, and he is not entitled to the decree, which he asks for in the prayer of the plaint, that he should be declared entitled to the whole of the property. But he has, I think, established a case in which, upon this plaint and the general prayer for relief, he is entitled to a decree. The plaintiff substantially claims to be interested

(1) 12 Moore's L. A., 523 ; see p.540.

in the property, and that appears upon the evidence to be true. He made defendants the other members of the family, besides Hurrish Chunder, who would be entitled to shares. Two of them appeared and put in a written statement and were examined as witnesses, and they did not dispute the right of plaintiff to receive the money. They admitted that some arrangement was made with the various members of the family by which the plaintiff was to receive the money and it was to be divided in a certain way. The other defendants have not appeared, and do not dispute the right of the plaintiff to receive their shares. I therefore think that the decree, which we should make, after reversing the decree of Pontifex, 'J., is a decree declaring that the first defendant is a trustee for the plaintiff, and for the other defendants except Hurrish Chunder, of their shares of what may be recovered upon the judgment, and that the shares of all of them, except Hurrish Chunder, be paid to the plaintiff. If any application should be made to us for the appointment of a receiver, we can entertain it, and we need not appoint a receiver now. We shall make a decree in the terms I have stated. The appellant will have the costs of this appeal on scale No. 2. The parties will pay their own costs of the suit on the same scale.

MACPHERSON, J.—I also think that this decree ought to be reversed. The purchaser unquestionably had notice that the plaintiff claimed a beneficial interest in this fund, and that he objected to the sale, and there was the presumption of Hindu law in favor of his having a beneficial interest in it. Having that notice, the purchaser chose to go on and to complete the transaction without really making any substantial enquiry in the matter. Under such circumstances, it appears to me clear that the purchaser took no more than the interest of Hurrish Chunder, his vendor, and therefore that the plaintiff is entitled to the decree proposed to be made.

Appeal allowed.

Attorney for the appellant: Baboo Denonath Bose.

Attorney for the respondent Doorgapersad Baboo: Mr. Paliologus.

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Before Mr. Justice Macpherson, Offg. Chief, Justice, and Mr. Justice Pontifex.

W. MORAN AND OTHERS (DEFENDANTS) v. THE RIVER STEAM NAVIGATION COMPANY (PLAINTIFFS).

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March 3.

Interim Injunction—Contradictory Affidavits—Suit for Specific Performance—Irreparable Injury—Letters Patent, 1862 & 1865—Act VIII of 1859, ss. 92 & 94—Appealable Order.

The plaintiffs being in possession of a certain mud dock used for docking and repairing vessels, and being threatened by the defendants with a suit to eject them therefrom, sued for specific performance of an alleged agreement between themselves and the defendants, under which they were, on certain terms, entitled to the use and occupation of the dock until the repairs of two of their vessels were completed; and for an injunction to restrain the defendants from ejecting them until the completion of the repairs. In support of an application for an *interim* injunction to restrain the defendants from taking proceedings to eject the plaintiffs until their suit had been heard, the affidavits of the plaintiffs stated that on the faith of the agreement one of their steamers had been docked and taken to pieces; that the repairs could not be finished for a considerable time, and that the vessel could not be removed from the dock, without great loss and irreparable injury to them. The affidavits of the defendants denied the making of the agreement alleged by the plaintiffs, and set forth another agreement, under which they alleged the plaintiffs had been in possession of the dock, and which agreement having come to an end they were entitled to eject the plaintiffs; they did not deny the loss to the plaintiffs which would be the result of moving the vessel before, the repairs were completed, nor did they allege any delay in making the repairs but they submitted that such loss would be the consequence of the plaintiffs' own act in docking their vessel without any final agreement having been come to between the parties. The dock was situated in the district of Hooghly, and the defendants' suit for possession, unless transferred to the High Court, would be tried in the Hooghly Court. There were facts which in the opinion of the Court went to show that the plaintiffs had acted *bona fide*. *Held*, (per MARKBY, J.) on the above facts that inasmuch as the plaintiffs' statements if true raised a fair and substantial question for decision as to the rights of the parties, and looking to the inconvenience of allowing the same matter to be litigated simultaneously in different Courts between the same parties, the plaintiffs were entitled to an *interim* injunction restraining the defendants from bringing their suit, until the plaintiffs' suit was heard.

Semble.—An *interim* injunction may issue although there is a contradiction on the facts.

On appeal the Court was of opinion that, under the circumstances, there was an equity which entitled the plaintiffs to be kept in quiet and undisturbed possession of the dock until the repairs were completed; and confirmed the order for an *ad interim* injunction, but modified it by restraining the defendants not from bringing their suit, but merely from executing any decree they might obtain therein until the plaintiffs should have had a reasonable time to complete the repairs of their vessel.

Although by the Letters Patent of 1865, the provisions of Act VIII of 1859 were not expressly made applicable to the High Court, as was done by the Letters Patent of 1862,—*semble*—the order granting the injunction was an order under s. 92, Act VIII of 1859, and therefore an appeal lay under s. 94.

APPEAL from an order of Markby, J., dated the 19th of February 1875, granting an *ad interim* injunction.

The plaintiffs brought a suit for specific performance of an agreement, which they alleged was entered into between them and the defendants, under which they were, on payment of a certain rent, entitled to the use and occupation of a certain mud dock for the repair of two of their vessels, and from which the defendants had threatened to eject them whilst they were making such repairs. The defendants being about to take proceedings in the Hooghly Court to recover possession of the dock, the plaintiffs applied for an *ad interim* injunction to restrain the defendants from taking such proceedings, pending the decision of the presentsuit, and from taking any other steps to interfere with the plaintiffs' possession of the dock until the repairs in course of being executed were completed.

The material facts in support of the application were stated to the following effect in an affidavit of John Mackinnon, a member of the firm of Macneill and Co., the agents and managers in India of the plaintiff-Company; that the dock formerly belonged to other owners than the defendants, and previous to 1873 the plaintiffs had been in occupation of it at a monthly rent of Rs. 100; that in August 1873 two of the plaintiffs' steamers the *Burmah* and the *Nepal* were in need of repairs, and one John Ritchie, the superintendent engineer in the plaintiffs' service, being authorized in that behalf by John Mackinnon, entered into negotiations with the defendants, who at that time were owners of the dock, for the use and occupation

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thereof to carry out the necessary repairs ; that it was mutually agreed between John Ritchie and James Murdock, one of the defendants, that the plaintiffs should have such use and occupation at a reasonable charge for the purpose of docking and repairing their two steamers until such repairs were completed, and on the faith of such agreement, the plaintiffs entered into possession of the dock ; that no definite sum was then fixed as the rent of the dock, but the defendants were aware of what the plaintiffs had previously paid ; that the steamer Burmah was docked in October 1873 and taken to pieces for the purpose of being repaired ; and, while the repairs were in course of being made, the defendants on 31st January 1874 sent a notice by letter to the plaintiffs that their charge for the dock would be Rs. 200 per month during the term of one year after 15th February 1874, but they did not then intimate to the plaintiffs that they would not be allowed to have the use of the dock until the completion of the repairs in case the repairs were not completed within the term of one year from February 1874, nor did the plaintiffs suppose that the defendants intended by their notice of 31st January 1874 to claim to have the right of ejecting the plaintiffs from possession of the dock on 15th February 1875 ; that the repairs of the Burmah were completed, and the steamer was taken from the dock on 31st May 1874, but the Nepal could not be then docked, the dock at that season being flooded because of the rains ; that on 26th October 1874 the Nepal was docked, and subsequently taken to pieces for repairs without any objection by the defendants : that while the repairs were being made, in December 1874, the defendants informed the plaintiffs that they would not be permitted to remain in occupation of the dock after 15th February 1875 unless they took a lease thereof for ten years at Rs. 500 a month, afterwards reduced to Rs. 400 a month, which the plaintiffs considered an exorbitant demand ; that the plaintiffs could not remove the steamer from the dock until the repairs were completed, except at a very great expence ; that the repairs were not be completed until June 1875 ; that the plaintiffs had offered to pay Rs. 500 a month for the dock until the repairs were finished, but the defendants would not agree to those terms ; but in violation of the agreement between them threatened the

plaintiffs with proceedings to eject them from possession of the dock ; and that if the defendants should succeed in turning them out, the result to them would be great and irreparable injury, whereas no loss would accrue to the defendants by the plaintiffs being permitted to remain in occupation of the dock until the repairs of their steamer were completed.

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An affidavit of John Ritchie was also filed in support of the application.

The affidavit of James Murdoch, one of the defendants, denied that the agreement alleged by the plaintiffs had been come to, but stated that in reply to a letter of 7th August from Mr. Mackinnon, saying that the plaintiffs would be glad to take the dock on reasonable terms, he had on the same day informed Mackinnon that the plaintiffs could have the use of the dock for six months certain at Rs. 100 a month, and that Mackinnon replied agreeing to take it on such terms ; that on 1st February he informed the plaintiffs by letter that they could have the dock for a further period of a year from 15th February at Rs. 200 a month, and that no reply was received thereto, but the plaintiffs continued to occupy the dock, and had paid the rent at the increased rate of Rs. 200 a month up to the present time ; that in December 1874, he called the attention of the plaintiffs to the fact that the further time of one year for which they took the dock would expire on 15th February 1875, and desired to know their intentions with regard to continuing in occupation thereof ; that the plaintiffs replied proposing terms to which the defendants were not willing to agree, and that the parties were unable subsequently to come to any terms in regard to the dock. The defendants denied that they were aware the plaintiffs had put the steamer Nepal in the dock for repairs.

The application came on for hearing on the 18th of February 1875, when the following judgment and order were pronounced and made by

MARKBY, J.—In this case the plaintiffs are the River steam Navigation Company, carrying on business in Calcutta, and the defendants are merchants in Calcutta and owners of a mud dock. It appears that the plaintiffs had been, for some time

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previous to this suit, in the habit of using this dock for the repairs of their vessels, paying the defendants and their predecessors a monthly sum for the use of the dock, and there is now in the dock a steamer under repair, belonging to the plaintiffs, called the Nepal.

This suit was filed in consequence of a notice given by the defendants to the plaintiffs to remove the steamer on the 15th of February. The general object of the suit is to enforce a right, which the plaintiffs say they have, to remain in possession of the dock until the repairs of the steamer are completed.

The plaintiff prays for a specific performance of an express agreement, to that effect, and also that it may be declared that the defendants are bound to allow the plaintiffs to retain the use of the dock until the repairs are completed, and that they may be restrained from preventing the plaintiffs using the dock during that time or taking any proceedings to eject them.

The present application is for an *interim* injunction in the terms of the latter part of the plaintiff, namely, to prevent the defendants taking proceedings to eject the plaintiffs until the suit has been heard. Upon the affidavits the plaintiffs have put their case in two ways. They say in the first place that there was an express understanding come to between their agent and the representative of the defendants, that they should have the use of the dock at any rate until the repairs of two vessels, the *Burmah* and the *Nepal*, were completed; they say that there never was a fixed term placed upon the occupation, though the rent to be paid was fixed for a certain time; and they also say that even if, as the defendants contend, there was a fixed term for their occupation of the dock, still the *Nepal*, which is now in the dock, was placed there in October, under the expectation that she would be allowed to remain there until her repairs were completed, and that the defendants so encouraged the plaintiffs in that expectation as to make it inequitable that they should now force the plaintiffs to take her out before these repairs are completed.

Now upon the first point, namely, whether there was an express arrangement that the occupation should continue until the *Nepal* is completely repaired, this is positively denied by

the defendants, and upon this the affidavits directly contradict each other. Upon the other part of the case there is not so direct a contradiction, but when the case comes to be tried, no doubt there will be a conflict on the facts.

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As I intimated yesterday, I am not now going to decide which of the parties is right in their statement of facts. It was contended by the Advocate-General that their case was admitted upon the correspondence: there are undoubtedly expressions which, if taken strictly, do support the defendants' case, but I am not at this moment prepared to say that they are conclusive. It was also broadly contended by the Advocate-General that when there is a contradiction upon the facts, an *interim* injunction cannot issue. But in a very large number of cases, *interim* injunctions issue simply in order to keep parties in *statu quo* while their rights are being determined, and there is generally a conflict upon the facts out of which these rights arise.

Looking at the case I have to consider, in the first place, whether it is right that the River Steam Navigation Company should be turned out of this dock whilst their rights are being investigated. Of course, if they have no rights *cadit questio*. But if their statement of the facts be true, then, and that is all I now say, there is a fair and substantial question to be decided as to what the rights of the parties are; and whilst of course I cannot assume that they have the right which they claim, neither can I assume that the defendants are justified in saying that that right does not exist.

Now upon the question, whether the defendants ought to be allowed to put the plaintiffs out of possession whilst their rights are being investigated, I must say I think they ought not. Let us see how the matter stands. The plaintiffs' agent, Mr. Mackinnon, has sworn in the 16th paragraph of his affidavit as follows:—"The plaintiffs cannot possibly remove the said vessel until the repairs are completed without great and ruinous expense, and although Rs. 200 a month is ample rent for the use of the said dock, the plaintiff-Company have, rather than have any dispute with the defendants, offered to pay Rs. 500 a month for the use of the same during the continuance of the repairs, and have also offered to submit the matter to arbitration." That

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offer shows the *bona fides* of the plaintiffs. The affidavit as to the impossibility of removing this vessel is corroborated also by Mr. Ritchie, the engineer. When these gentlemen say it is impossible to remove her, of course I do not understand them to say it is physically and absolutely impossible, but from the plan attached to Mr. Ritchie's affidavit, I understand that any attempt to float the vessel now will be fruitless, and that she is in such a condition that she can be taken away only piecemeal. Now the defendants do not deny that, nor do they deny that the difficulties would be such as the plaintiffs say, nor do they say that the plaintiffs have been slow or negligent in carrying out these repairs. In fact, they simply say that it was the plaintiffs' own folly to take the vessel to pieces in October when their term ended in February and that they must take the consequences. Now it certainly is a most unreasonable thing, that this vessel should be removed and this great loss and waste of money occasioned to the plaintiffs before the right of the defendants to remove the vessel has been ultimately determined. That opinion I expressed yesterday at the close of the day. But the doubt I still felt was whether this is a proper case for granting an *interim* injunction.

The Advocate-General contends that the only proceedings to eject the plaintiffs that could be taken would be by a suit for possession in the Court of the district of Hooghly, where the dock is situated, and that the defendants in that suit, who are the plaintiffs in this, would have full opportunity of raising the questions which they have raised here by way of defence to the suit for possession, and therefore that the injunction is wholly unnecessary. So far I think the argument is correct. On the other hand, I did not understand the Advocate-General to contend that this Court had not full jurisdiction in the present suit. At any rate the special leave of the Court having been granted to bring the suit in this Court, and no doubt existing in my mind as to the jurisdiction of this Court, no difficulty arises on that part of the case. The question is whether I ought to inhibit the proceedings in the Hooghly Court. Very little assistance appears to me capable of being derived on this part of the case from the English decisions, because

the relations between the Court of Chancery and the Courts of Common Law in England are very different from those between this Court and the mofussil Courts. The Courts of Common Law in England are wholly independent of the Courts of Chancery. The Courts of Chancery have no control over the Courts of Common Law, they have only control over the suitors before them, and the Courts of Chancery will therefore, of course, never interfere in any case where the Courts of Common Law can administer full justice. But they frequently do interfere, because there are many cases in which in Courts of Common Law full justice cannot be done. But this Court and the Hooghly Court have substantially the same powers, so far as this case is concerned. For the purpose of this case the law administered by the Hooghly Court and by this Court would be substantially the same, and I cannot say that in the Hooghly Court complete justice could not be done. So far, that is against the injunction being granted.

On the other hand, it cannot be denied that there are cases, especially where the parties are Europeans residing in Calcutta, which it is desirable should be tried in this Court and not in the mofussil. At any rate this is clear, that this Court having full jurisdiction in the matter ought not, if it can prevent it, to show the same matter to be simultaneously litigated in this Court and in the mofussil between the same parties. That would be most undesirable, and if the two Courts came to a different result, would be most inconvenient. It really therefore comes to a question where this suit ought to be tried. Now that is a matter upon which this Court has a very wide discretion. Under the Charter this Court can remove any case from the mofussil if it thinks justice can be better administered by trying the case here.

Now as to whether it is desirable that this case should be tried here or in the mofussil, I think the suit having been filed first in this Court, and being a suit in which this Court can do full justice, this is the Court in which the suit ought to be tried, and I therefore think I ought to grant the injunction.

One point remains. It was argued by the Advocate-General that this Court cannot do full justice because it cannot give

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1875 possession of land in Hooghly. Mr. Woodroffe referred to a case decided by the officiating Chief Justice, in which a decree was made, by which possession of land in the mofussil. **MORAN** was practically given (1).
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(1) *Puddomani Dasi v. Juggodumba Dasi*.—This case, which was decided by Macpherson, J., on the 21st December 1874, was a suit by certain trustees against others to have a deed of trust, under which both were appointed constituted, and given effect to, and to protect the trust property from the alleged improper acts of the defendant-trustees by the appointment of a receiver, and by an injunction restraining the defendants from dealing with the property. The land, the subject of the deed of trust, was situated in the mofussil. An objection was raised by the defendants that the High Court had no jurisdiction, inasmuch as the whole of the property, the subject-matter of the suit, was situated beyond the jurisdiction of the Court. On this point the learned Judge said :—“As regards the first issue, I think that the suit is not a suit for land or other immoveable property, and that this Court has jurisdiction as all the parties are personally subject to the jurisdiction. [His Lordship then described the nature of the suit.] The deed of gift of the 18th February 1861 gives neither the plaintiffs nor the defendants any beneficial interest in this property. The property is given to the deities named. The plaintiffs and defendants are appointed sebaits or managers of the property and of the worship and at the same time are expressly directed to accumulate for the benefit of the deities any surplus which may remain after defraying the expenses of management and keeping up the worship, &c. Under the deed the sebaits have no sort of personal beneficial interest in the property : and

they have no right to appropriate any portion of it or of its income. and their position is not altered in this respect by the consent decree of May 20th, 1868. This being the case the suit is not in my opinion a suit for land or other immoveable property within the meaning of s. 12 of the Letters Patent, even although the plaintiffs seek to have it declared that they are trustees and managers jointly with the defendants of lands in the mofussil. If the plaintiffs as co-trustees are entitled to an account from the defendants of the trust monies come to their hands and their application thereof, I cannot see how the fact that those monies are derived from lands in the mofussil can deprive this Court of jurisdiction, when the accounting party is personally subject as being a resident of Calcutta. In so deciding I follow the current of decisions in this Court. * * * *

As regards the appointment of a receiver (which the defendant Jodoonath Chowdhry, in his written statement, asks for as well as the plaintiffs), I should not hesitate to make such an appointment so far as any question of jurisdiction is concerned. But it is undesirable to interfere in the management of a trust such as this, if the sebaits will but carry it out among themselves. I shall therefore not appoint a receiver at present, in the hope that the parties will be reasonable. But I shall reserve leave to the plaintiff to apply hereafter for the appointment of a receiver, if the conduct of the defendant Juggodumba or the other defendants should render it necessary.

I do not think it necessary to inquire further into that, because the plaintiffs have made an offer in this case which entirely removes the pressure of that argument. The plaintiffs have offered to give the defendants a decree for possession in the Hooghly Court on their undertaking not to execute the decree until this suit has been heard. Of course, the defendants are not bound to accept that offer, but that offer having been made, it deprives the argument as to this Court not being able to give possession of all force.

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On these grounds I think there ought to be an injunction in these terms.

Plaintiffs undertaking until further order to pay into Court on the 15th of March and the 15th of each succeeding month Rs. 500 to the credit of this cause, and undertaking to abide the order of the Court as to the fair amount of rent to be paid to the defendants for the use of the dock, and to pay any damages which the defendants may sustain by reason of this order, and further to give over to the defendants full and complete possession of the dock on the 15th of May, it is ordered that the defendants be restrained until the hearing of this cause from bringing any suit for recovery of the possession of this dock or taking any steps to recover possession. [Mr Lowe states that he gives the undertaking.] Mr. Lowe having on behalf of his clients given the undertaking the injunction will go. The costs of this motion are reserved until the hearing.

From this order the defendants appealed.

The *Advocate-General* offg. (Mr. Paul) and Mr. W. Jackson the appellants.

Mr Lowe, Mr. Woodroffe, and Mr. Phillips for the respondents.

Mr. Woodroffe took a preliminary objection to the appeal, on the ground that the order granting the injunction was not an appealable order, since it merely granted an *ad interim* injunction without deciding any question of right. The clause under which this appeal is brought is cl. 15 of the Letters

1875 Patent. In the case of *DeSouza v. Coles* (1), the word
 MORAN "judgment" in that clause was considered to have a general
 RIVER STREAM meaning; but the construction put upon the word by this
 NAVIGATION Court is different; see *Justices of the Peace for Calcutta v.*
 COMPANY. *The Oriental Gas Company* (2), which was analogous to the
 present case. The case of *Hadjes Ismail Hadjes Hubbeeb v. Hadjes*
Mahomed Hadjee Joosub (3) proceeded on the same ground. It
 was there held that an appeal lies from an order admitting a
 plaint, because such an order determines the jurisdiction of the
 Court, i.e., determines the plaintiff's right to sue in a particular
 Court. The question whether an appeal would lie from an inter-
 locutory order directing payment by the sheriff of a sum of
 money which had been attached in his hands was raised, but not
 decided, in *Bamasoondery Dossee v. Nilmoney Chunder* (4).
 S. 94, Act VIII of 1859, gives appeals from orders granting
 injunctions under ss. 92 and 93. But it is doubtful whether those
 sections have now any application to the High Court on its Ori-
 ginal Side; See *Prasannamayi Dasi v. Kadambini Dasi* (5)
 in which case, Norman, J., points out the difference between
 the Charters of 1862 and 1865. By the Charter of 1862 the
 provisions of Act VIII of 1859 were incorporated with the
 rules of this Court. But the latter Charter does not do so; it
 only declares that the rules framed by the Court should not be
 inconsistent with the provisions of Act VIII of 1859. Since
 the repeal of the Charter of 1862 the High Court no longer
 issues injunctions under Act VIII of 1859, but does so by
 virtue of the equitable jurisdiction which it derived from the
 Supreme Court, there is now therefore no appeal from orders
 granting injunctions, since an appeal will not lie unless expressly
 given by law—*Attorney-General v. Sillem* (6). [MACPHER-
 SON, C.J.—Mr. Advocate-General, we will not call upon you
 to reply on this point, for we are of opinion that there is
 an appeal, as the order is substantially under s. 92 of the
 Act.]

(1) 3 Mad. H. C. Rep., 384.

(2) 8 B. L. R., 433.

(3) 13 B. L. R., 91.

(4) Coryton's Rep., 56.

(5) 3 B. L. R., O. C., 85.

(6) 33 L. J., Ex., 209.

The *Advocate-General*, for the appellant, contended that no injunction ought to have been granted in this case; the plaintiffs alleged that if the suit had been brought by the defendants in the Hooghly Court they would have had a good defence. The ordinary rule in these cases, when there are conflicting affidavits, and the contract is disputed, is not to grant an injunction—Kerr on Injunctions, p. 536. The facts disclosed by the plaintiffs' affidavits being contradicted in every particular by those on the part of the defendants, the Court should not have granted the injunction, especially as it gives the plaintiffs all the relief they could have got in the suit itself. The affidavits, however, show that there was no probability of the plaintiffs succeeding in this case; and it has been held that unless there be such a probability, the Court will not grant an injunction—*Olayton v. Attorney-General* (1). [PONTIFEX, J.—Even if the plaintiffs fail as to the alleged contract, have they not an equity to fall back upon? see *Powell v. Thomas* (2).] There was room for misunderstanding, whereas the present case falls within the rule in *Ramsden v. Dyson* (3) that when a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from enforcing his legal rights. Moreover, the facts upon which the plaintiffs claim an injunction being traversed in the affidavits filed on the defendants' behalf, no injunction should issue—*Sanxter v. Foster* (4) and *Pyecroft v. Pyecroft* (5).

Mr. *Jackson* on the same side.—So far as the plaintiffs' case rests on a supposed contract, it must fail; for even assuming the facts to be as the plaintiffs stated, there is such a want of mutuality in the contract alleged as would disentitle the plaintiffs to obtain specific performance, and the Court will not grant an injunction to restrain the breach of an agreement which it cannot specifically enforce—*Hills v. Croll* (6), *Pickering v. Bishop of Ely* (7), *Munro v Wivenhoe and Bright-*

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(1) 1 Coop., Ch. Ca., 97; see p. 139. (5) 2 Sm. & Giff., 326.

(2) 6 Hare, 300.

(6) 1 Coop., Ch. Ca., 84.

(3) 1 L. R., H. L., 129.

(7) 2 Y. & C., Ch. Ca., 249.

(4) 1 Cr., & Ph., 302.

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lingsea Railway Co. (1), *Baldwin v. The Society for The Diffusion of Useful Knowledge* (2), *Clarke v. Price* (3) and *Blackett v. Bates* (4). Nor will the Court interfere when there is a complete remedy at law—*Garstin v. Asplin* (5), *Simpson v. Lord Howden* (6), *Hardinge v. Webster* (7), *Castelli v. Cook* (8), and *Jackson v. Stanhope* (9). A bill seeking to restrain an action at law is demurrable if it does not show a ground on which the action could be sustained—*Derbyshire, &c., Railway Co v. Serrell* (10) and *Davies v. Salisbury* (11). To entitle a plaintiff to an injunction, he must show there is a probability of his succeeding in his suit—*Clayton v. Attorney-General* (12), *Attorney-General v. Mayor of Wigan* (13), *Sparrow v. Oxford, &c., Railway Co.* (14), *North Staffordshire Steel and Co v. Camoys* (15), and *Osborne v. Eales* (16). An injunction will not be granted where the facts are doubtful, and in this case the plaintiffs' affidavits are directly contradicted—*Sanster v. Foster* (17), *Hardley v. London Bank of Scotland* (18), *Grech v. Oram* (19), *M'Curdy v. Noak* (20), and *De Tastel v. Bordenave* (21). Before granting an injunction, the Court should be satisfied that it can restore the party against whom it issues to his original position in the event of his establishing his right—*East Lancashire Railway Co. v. Hattersley* (22), *Rigby v. Great Western Railway Co.* (23), and *Hilton v. Earl of Granville* (24). As to the principles which guide a Court of Equity in restraining proceedings in another Court of Equity, see *Prudential Assurance Co. v. Thomas* (25) and *Sieveling v. Behrens* (26).

(1) 11 Jur., N. S., 612.

(2) 9 Sim., 393.

(3) 2 Wils., Ch. Ca., 157.

(4) L. R., 1 Ch., 117.

(5) 1 Madd., 150.

(6) 3 Myl. & Cr., 97.

(7) 1 Dr. & Sm., 101.

(8) 7 Hare, 89.

(9) 15 L. J., Ch., 446.

(10) 2 De G. & Sm., 353.

(11) 14 L. J., Ch., 153.

(12) 1 Coop., Ch. Ca., 97; see p. 139.

(13) 5 De G. M. & G., 52.

(14) 9 Hare., 436; see p. 441.

(15) 11 Jur., N. S. 555.

(16) 2 Moore's P. O., N. S., 125.

(17) 1 Cr. & Ph. 302.

(18) 11 Jur., N. S., 554.

(19) 39 L. J., Ch. 126.

(20) 17 L. J., Ch., 165.

(21) Jac., 516.

(22) 8 Hare, 72; see p. 94.

(23) 2 Phillips, 44; see p. 50.

(24) 1 Cr. & Ph., 283.

(25) L. R., 3 Ch., 74.

(26) Myl. & Cr., 581.

In order to found an equity on the acquiescence of another in dealings with his property, there must be an ignorance of his rights on the part of the person incurring expenditure, and a knowledge that he is ignorant on the part of the person who permits such expenditure to be incurred—*East India Co. v. Vincent* (1), *Pilling v. Armitage* (2), *Master of Clare Hall v. Harding* (3), *Rennie v. Young* (4), *Ramsden v. Dyson* (5), *Crampton v. Varna Railway Co.* (6), and *O'Fay v. Burke* (7).

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The respondents were not called upon.

The judgments of the Court was delivered by

MACPHERSON, C.J.—This appeal has been very ably argued by Mr. Jackson, who has put his clients' case very forcibly before us. Nevertheless, I am of opinion that the injunction granted is right and ought to be maintained so far as we are now concerned, except in one matter which I shall presently mention.

It seems enough for me to say that the learned Judge was right in the conclusion he arrived at; and that, upon these affidavits, I consider it is made out that the ship was docked and taken to pieces in the belief and with the intention, on the part of the representatives both of the plaintiffs and of the defendants, that a fresh arrangement would be come to for her remaining in the dock, subsequent to the 15th of February, for the time necessary to complete her repairs.

The ship being in dock under such circumstances, and bearing in mind the peculiar position of the vessel and the peculiar character of the defendants' property, that is to say, its being a dock used as it has been used lately—I think with reference to those circumstances which are very special, that there is an equity which entitles the respondents to be kept in quiet and undisturbed possession until they complete the repairs of the ship, upon the terms which have been imposed upon them by

(1) 2 Atk., 83.

(2) 12 Ves., 78.

(3) 6 Hare, 273.

(4) 2 De G. & J., 136.

(5) 1 L. R., H. L., 129.

(6) 41 L. J. Ch., 817.

(7) 8 Ir. Ch., 226, 511.

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Markby, J. These terms are not such as they have been described by Mr. Jackson to be. They are stringent and substantial, because they provide for the payment not only of rent at Rs. 500 a month, but of any damages which the appellants can show themselves to have sustained by reason of their not being restored to possession on the 15th of February.

I have some doubts as to how far the Court ought to have absolutely restrained the defendants from bringing their suit in the Hooghly Court; but none as to their being restrained from executing any decree until the plaintiffs shall have had a reasonable time within which to complete the repairs of the Nepal and remove her,

Therefore, I think the order should be modified so far as to allow the defendants to bring a suit for possession in the Hooghly Court, but they must still be restrained from executing before the 15th of May any decree or order which they may obtain.

Mr. Woodroffe, on behalf of the plaintiffs, offers to give the defendants an immediate decree for possession in the Hooghly Court upon a plaint being filed, the defendants being restrained by our order from executing such decree and from ejecting the plaintiffs from, or interfering with the plaintiffs' possession of, the dock, or interfering with the plaintiffs' ship, until the 15th of May. Upon these terms the defendants may bring and proceed with such suit for possession in the Hooghly Court as they may be advised.

Subject to this modification the appeal is dismissed with costs.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Berners, Sanderson, and Upton.*

Attorneys for the respondents: Messrs. *Chauntrell, Knowles, and Roberts.*

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice McDonnell
 JAMES HILLS AND ANOTHER (DEFENDANTS) v. S. G. CLARK
 (PLAINTIFF).*

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 Sept. 21

Jurisdiction—Cause of Action—Act VIII of 1859 s.5.

By a contract entered into at Beerpore, in the district of Nuddea, the plaintiff agreed to supply indigo-seed to the defendant, the seed to be paid for on delivery by an order to be sent to the plaintiff on receipt of the seed. The plaintiff resided at Berhampore, in the district of Moorshedabad, and the defendant carried on business at Beerpore, in the district of Nuddea, where delivery was to be made. The seed was delivered by the plaintiff as agreed, but the defendant refused to pay for it. In an action brought in the Moorshedabad Court to recover the price of the seed, *held*, that the Moorshedabad Court had jurisdiction to entertain the suit. The refusal of payment by the defendant, which was to have been made in the district of Moorshedabad, was a sufficient cause of action under s. 5, Act VI II of 1859, to enable the plaintiff to sue in that Court.

Sembla.—The words “cause of action” in that section do not mean the whole cause of action.

SUIT to recover Rs. 2,283, the price of certain indigo-seed supplied by contract by the plaintiff to the defendant, the agreement being that the seed was to be paid for on delivery, by an order for payment being sent by the defendant to the plaintiff on receipt of the seed. The plaintiff resided and carried on business at Berhampore within the local limits of the Moorshedabad Court. The defendant resided at Nischindapore factory, and the seed was to be delivered to him at Beerpore factory, both in Zilla Nuddea and out of the local limits of the jurisdiction of the Court of Moorshedabad. The plaintiff delivered the seed as agreed upon, and it was accepted, and the receipt acknowledged by the defendant, who, however, failed to pay the price thereof. The suit was brought in the Court of the Subordinate Judge of Moorshedabad.

The defendant, in his written statement, submitted (*inter alia*) that the suit could not be entertained by the Moorshedabad Court, inasmuch as the contract for the seed was made, and the delivery

*Special Appeal, No. 1045 of 1874, against a decree of the Judge of Zilla Moorshedabad, dated the 2nd March 1874, affirming a decree of the Subordinate Judge of that district, dated the 4th August 1873

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and receipt thereof took place, not within the jurisdiction of that Court, but at Beerpore, in the district of Nuddea.

The Subordinate Judge was of opinion that the delivery alone did not constitute the whole cause of action; but that as the payment was to be made to the plaintiff at Berhampore, the failure of the defendant to pay the price there was a part of the cause of action arising within the jurisdiction. He accordingly gave a decree for the plaintiff.

The Judge, on appeal, affirmed this decision, holding that the cause of action arose within the jurisdiction, as the concordance between the parties was arrived at where the defendant's acceptance was communicated to the plaintiff, and because the breach of the agreement, viz., the non-payment of the price of the seed, was referable to the same place, viz., Berhampore.

The defendant appealed to the High Court, on the ground, among others, that the Courts had no jurisdiction to entertain the suit.

Mr. *Evans* (with him Mr. *Adkin*), for the appellant, contended that "cause of action" meant the whole cause of action, and inasmuch as the delivery, which was a material part of the cause of action, was to be made in another district than that in which the suit was brought, viz., in Nuddea, the whole cause of action did not arise within the jurisdiction of the Court at Moorshedabad, so as to enable the plaintiff to bring his suit in that Court. He cited *Cherry v. Thomson* (1), *Mothoormohun Roy v. Jadoomoney Dossee* (2), *Greeschunder Banerjee v. Collins* (3), *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (4), and *De Souza v. Coles* (5), per Bittleston, J.

Baboo *Creesh Chunder Ghose*, for the respondent, contended that the case was governed by s. 5 of Act VIII of 1859; and, as the payment for the seed was to be made in the district of Moorshedabad, the cause of action arose in that district within the meaning of that section. He relied on the case of *Gopikrishna Gossami v. Nilkomul Banerjee* (6), and referred to the decision of Holloway, J., in *De Souza v. Coles* (5).

(1) L. R., 7 Q. B., 573.

(2) 10 B. L. R., 122.

(3) 2 Hyde, 79.

(4) 13 B. L. R., 91.

(5) 3 Mad. H. C. Rep., 384.

(6) 12 B. L. R., 461.

Mr. *Evans* in reply.

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The judgment of the Court was delivered by

JACKSON, J.—The only question raised in this case was whether the Court of the Subordinate Judge of Moorshedabad had jurisdiction to try the suit. This question was decided both by that Court and by the lower Appellate Court in favor of the plaintiff. The learned Counsel who addressed us for the special appellants argued this matter at considerable length, but those arguments were chiefly based upon English cases or upon cases arising on the Original Side of the High Court; and the decisions in those cases—at least those which appear to have prevailed in England turn chiefly upon the words “whole cause of action,” the term “cause of action” in England having been construed to mean the whole cause of action; and the Letters Patent of the High Court, in regard to the exercise of the ordinary original civil jurisdiction, contain the expression in whole or in part. In particular, our attention was called to an elaborate and very learned judgment of Holloway, J., in the case of *DeSouza v. Coles* (1). It appears to us that, in this case, the plaintiffs cause of action consisted in this,—that the defendants refused to pay the price of certain indigo-seed supplied to them by the plaintiff at their request, which payment ought to have been made at the plaintiff’s residence. There was therefore an expectation of the fulfilment of the contract within the district of Moorshedabad. We think it is not necessary to interpret the words “cause of action” as meaning the whole cause of action; and consequently the English cases, and the cases decided on the Original Side, afford no guide. Within the meaning of s. 5 of the Code of Civil Procedure, that seems to be a cause of action which would entitle plaintiff to relief. We think therefore that the Subordinate Judge’s Court at Moorshedabad had jurisdiction to try this case, and that the objection on this point must be overruled. It is agreed that the defendants have no grounds of complaint as regards the measure of damages. The special appeal is, therefore, dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Couch Kt., Chief Justice. Mr. Justice Kemp, Mr. Justice Jackson Mr. Justice Phear, and Mr. Justice Ainslie.

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Dec. 21.

**MAHARAJA BHEERCHUNDER MANICK BAHADOOR (PLAINTIFF) v.
RAMKISHEN SHAW AND ANOTHER (DEFENDANTS).***

Evidence, Admissibility of—Decree barred by Limitation.

A decree for rent is admissible in evidence against a defendant to prove the rate of rent he was liable to pay, although the decree has not been executed for three years, and has therefore become barred under the law of limitation.

In this case the question referred to the Full Bench was whether a decree for rent which had not been executed for three years, and had become barred under the law of limitation, was receivable in evidence. The facts of the case are stated in the referring order by Couch, C.J., and Ainslie, J., which was as follows:—

This is a suit for rent for 1279 F. S. (1871-72), the plaintiff having obtained an *ex parte* decree against the defendant for Rs. 75-8-8 for rent on account of 1278 F. S. (1870-71). This decree had not been executed within three years, and it was contended that it could not be used as evidence of the rate of rent which the defendant was liable to pay. The Munsif held that it could, and made a decree for the plaintiff. This has been reversed on appeal, the officiating Judge saying:—"As no steps were taken to execute the decree of 1278 F. S. (1870-71), and the period of limitation was allowed to elapse, it became inoperative and can no more be held alive for the purposes of evidence than to establish a debt for the rent of 1278 F. S. (1870-71)." This judgment is supported by the decision in *Ram Sunder Tewari v.*

* Special appeal, No. 76 of 1874, from a decision of the Officiating Judge of Tipperah, dated the 19th September 1873, reversing a decree of the Munsif of Noorgunge, dated the 30th April 1873.

Srimunt Dewasi (1); and as we differ from that decision, we refer this appeal for the decision of a Full Bench, the point being whether the decree could be used as evidence.

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(1) *Before Mr. Justice Bayley and Mr. Justice Glover.* declares that the plaintiff held land in Surrakdihikumoopore, and therefore the statement of the defendant to the contrary should have been considered as of no weight and this decree, the special appellant also urges, is further proof that the defendant's receipt of rent was not *bona fide*. The pleader also cited the cases of *Hurronath Roy v. Prannath Roy Chowdhry* (a) and *Woomash Chynder Dutt v. Bhugoban Chunder Roy* (b) in support of his contention.

The 31st July 1868.

RAM SUNDER TEWARI (PLAINTIFF)
v. SRIMUNT DEWASI AND OTHER

(DEFENDANTS).*

Evidence, Admissibility of—decree barred by Limitation.

A decree for rent in a suit under Act X of 1859 against the defendant, an intervenor, which has remained unexecuted for more than three years, is not a subsequent suit admissible in evidence to show that the defendant had not, during a period subsequent to the decree been in *bona fide* receipt of the rent.

Baboo Bhowanee Churn Dutt for the appellant

The respondents did not appear.

The following judgments were delivered :—

BAYLEY, J.—I am of opinion this appeal ought to be dismissed.

The chief contention in special appeal is that the lower Appellate Court has wrongly decided that the defendant is in actual receipt of the rents *bona fide*, inasmuch as by a decree of the 26th February 1862 the plaintiff's title was declared in a suit under Act X of 1859 at which time the defendant appeared as an intervenor in that case, consequently no *bona fides* could exist in the actual receipt of rent by the defendant. It is also contended that another decree dated 5th September 1865, distinctly

It is admitted before us, as in the Courts below, that the decree relied upon, of 26th February 1862, was not executed or enforced in any way what ever. It is also admitted that the three years' limitation prescribed by s. 92, Act X of 1859, expired on the 26th February 1863, and this suit was brought on the 11th April 1866.

In my opinion when a decree is not executed within the period allowed by law for execution, its operation ceases and it no longer remains a decree, unless revived by order of a competent Court. No such revival appears in this case. The lower Appellate Court was therefore right in thinking that the decree was no evidence against the fact of the defendant's having actually received the rents as required by the law (s. 77), that is, *bona fide*.

It is contended that the lower Appellate Court does not state in express terms that receipt of the rent was *bona fide*; but to my mind, look-

(a) 7 W. R., 85.

(b) 9 W. R., 305.

* Special Appeal, No. 2023 of 1867, against a decree of the Judicial Commissioner of Zilla Chota Nagpore, dated the 20th May 1867, affirming a decree of the Assistant Commissioner of that district, dated the 9th June 1866.

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Baboo Doorga Mohun Doss, for the appellant, contended that the decree, though barred, was admissible in evidence. It had become inoperative as a decree for the purpose of realizing any arrears by execution, but it was evidence of the fact that the plaintiff had been entitled to realize the arrears due at a certain rate. The decision in *Ram Sunder Tewari v. Srimunt Dewasi* (1) he contended was incorrect.

Baboo Hurry Mohun Chuckerbutty for the respondents.—An *ex parte* decree for rent is no evidence at all, and is not admissible in evidence—*Anna Purna Dasi v. Joykisto Mookerjee* (2). Decrees that are barred and have become inoperative are not admissible in evidence—*Ramjeeaoun Rai v. Deep Narain Rai* (3) and *Ram Sunder Tewari Srimunt Dewasi* (1).

Baboo Doorga Mohun Doss was not called upon to reply.

The judgment of the Full Bench was delivered by.

COUCH C. J.—We are of opinion that the decree is admissible in evidence. The question of its value when admitted is to be determined by the lower Courts. The defendant has alleged that it was obtained fraudulently. It does not appear

ing to the inoperative decree of the plaintiff on one hand, and the actual receipt of rent by the defendant on the other, the lower Appellate Court substantially holds the receipt to be *bond fide* as contemplated by s. 77, Act X of 1859.

Referring to the two cases cited above, I have only to say that they only lay down what is an admitted rule of law, viz., that the receipt contemplated by s. 77 is not to be only actual but *bond fide*, and have no further bearing whatever on the present case.

With regard to the plea that, because the decree of 1865 laid down that the plaintiff had lands in Surra-k-dihikumopore, the defendant's re-

ceipt of rent was not *bond fide* or compatible with his allegation that there was no such land, I would only remark that I do not think the question of *bond fides* of receipt of rent can be decided in that view; because the one matter is independent of the other.

In this view I would dismiss the appeal but without costs, as the respondent does not appear.

GROVER, J.—I concur in dismissing the special appeal.

(1) *Ante*, p. 371.

(2) W. R., Jany. to July 1864, Act X Rul., 107.

(3) Agra H. C. Rep., F. B. Rul. 1866-67, 78.

that he gave any evidence of this, and it will be for the Court to say whether there is any evidence in support of that allegation. The decree of the Officiating Judge must be reversed, and the suit must be remanded to him for rehearing. The costs will follow the result.

The case decided by the Full Bench at Agra—*Ramjeeawan Rai v. Deep Narain Rai* (1)—which was referred to by the pleader for the respondents, does not appear to us to be applicable.

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PRIVY COUNCIL.

LUCHMUN SINGH (PLAINTIFF) v. TIRBANI BUKSH, SUCCESSOR OF
SHUMSHERE SINGH (DEFENDANT).

[On Appeal from the Court of the Financial Commissioner of Oudh.]
Review, Application for — Act VIII of 1859, s. 377.

P. C.*
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Dec. 11.

Where a party applying for a review of judgment after the expiry of the period of ninety days allowed by s. 377, Act VIII of 1859, had not, as required by that section, shown any just and reasonable cause for not preferring his application within the prescribed period, the order admitting the review was held to have been improperly granted, and was set aside, with all subsequent proceedings thereon.

APPEAL from a decision of the Financial Commissioner of Oudh, dated 29th June 1863, confirming an order of the Settlement Officer of Seetapore, dated 14th July 1864.

This suit was brought in the Court of the Settlement Officer of Seetapore on 11th December 1863, by whom, on 14th July 1864, it was dismissed. The Settlement Commissioner of Oudh, Mr. Currie, reversed this decision on 5th September 1864, and gave a decree for the plaintiff. On 29th November 1864, the defendant preferred a special appeal to the Financial Commissioner of Oudh, in which the decision was pronounced on 24th

(1) Agra. H. C. Rep., F. B. Rul., 1866-67, 78.

* Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND
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September 1867, by Colonel Barrow, then officiating as Financial Commissioner, affirming the decision of the Settlement Commissioner. On 27th November 1867, the defendant applied for a review of this order, but his application was rejected by Mr. Davies, then Financial Commissioner. On 24th April 1868, another application for review was made to Colonel Barrow, who had succeeded Mr. Davies as Commissioner. The case was by him remanded, and after remand he made an order, on 29th June 1868, that all intermediate orders should be quashed, and the original decree of 14th July 1864 should stand good.

From this decision the plaintiffs appealed to Her Majesty in Council. The only question material to this report was whether the review ought to be set aside with all subsequent proceedings as having been improperly granted.

Mr. Leith, Q. C. (Mr. J. Arathoon with him) for the appellants.—It was not competent to Colonel Barrow to entertain an application made in April 1868 for a review of his judgment of September 1867, unless just and reasonable cause were shewn as provided by s. 377, Act VIII of 1859, for not making the application within ninety days—*Maharaja Moheshur Sing v. The Bengal Government* (1), *Gunganarain Roy v. Goonoomoonas* (2). Moreover, the application for review which Colonel Barrow entertained was admitted more than ninety days after a similar application had been rejected by Mr. Davies. Under such circumstances the order passed by Colonel Barrow admitting the review, and all subsequent proceedings, must be set aside.

Mr. T. H. Cowie, Q. C., for the respondent.—There has been a misapprehension of the facts of the case on the part of the Settlement Commissioner. He had not before him, or has not considered, the statement made by Luchmun Singh, in the *khewat* proceeding of 1859. The *khewat* statement bound the appellant Luchmun, and there was virtually no evidence to support the finding that the parties were members of an undivided family within the period of limitation. The evidence proved the contrary.

(1) 7 Moore's I. A., 283.

(2) 8 W. R., 184.

The judgment of their LORDSHIPS was delivered by

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SIR BARNES PEACOCK.—IN this case Luchmun Singh brought a suit against Shumshere Singh in the Court of the Settlement Officer of Seetapore. His suit was to recover one-fourth of an estate situate in that district. Luchmun Singh was the representative of one of five brothers, who were the sons of Ojeeb Singh. He was the son, actually, of Bhugwunt Singh, but he had been adopted and taken out of Bhugwunt Singh's family by Rae Singh, who was one of the other five brothers. Bhugwunt Singh subsequently died without leaving any other issue, his other son, the brother of the plaintiff, having been killed in the mutiny, and in consequence the shares, which were originally held by five brothers, belonged to four. Luchmun Singh, therefore, as the adopted son of Rae Singh, claimed one-fourth of the estate. It appears that Shumshere Singh was the person who had signed the kabuliat, and had contracted for the Government revenue, but the brothers were a joint undivided Hindu family up to a certain period; and the question was whether the plaintiff had proved that they were joint, both in food and estate, within the period of limitation. The period of limitation in Oudh with regard to cases of this nature depends upon Act XIII of 1866 of the Government of India, which enacts that no suit relating to any tenure which, under the provisions of Act No. XVI of 1865, shall be solely cognizable in the Courts of Revenue in the said province (and this is one of those cases) shall be barred under the rules of limitation in force in such Courts if the cause of suit shall have arisen on or after the 13th day of February 1844.

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The question was whether Luchmun Singh's cause of action to have a share of this estate did accrue subsequently to the commencement of the year 1814. The case was tried before the Settlement Officer, who found certain facts. He says: "The defendants deny possession as proprietor or sharer, and claim to have held the full proprietary right for some years prior to the term of limitation. The question before the Court then is,—(i) has the plaintiff been in possession of any rights within the term of limitation? and if so (ii) are they

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the rights of a proprietor? The onus of proof rests on the plaintiff. A review of the proceedings in the District Court and of the evidence produced by the plaintiff now seem to me to establish that:--First. For many years immediately preceding annexation, the plaintiff was on perfectly amicable terms with the defendant, and received his support in common with the defendant himself and some other relations from the estate. Disputes arose at the close of 1263 Fuslee (1856), ending in an affray, in which the defendant's brother was killed. These disputes arose either because—(i) plaintiff then, for the first time, set up a claim to a share, or (ii) defendant, for the first time, sought to deprive the plaintiff of a share. The plaintiff was completely ejected till 1266 Fuslee (1859-60), when, by order of Court, he was put into possession of what was thought to be his sir land, nominally 100 bigas, but really 150, the order being to put him in possession of what he had before. The plaintiff is still in possession of this sir. Up to this point there seems no doubt about the facts. Beyond this there may be doubt. In my opinion the plaintiff has wholly failed to prove, and there is no reasonable hope that he can establish his allegation, that he participated annually in the profits to the extent of one-fourth, and was therefore a sharer or part proprietor." But it would not be necessary for a member of an undivided family to prove that he participated in the profits to the full extent of his share. It is very common among joint families that the expenses of the family are paid out of the common fund, and that each member draws a certain sum as he requires it, but there is no account taken between the members of the family to see whether each member receives his full share.

Then the Settlement Officer goes into the question of sir land, and discusses the question whether the occupation of the sir land would take the case out of limitation, provided he had nothing else. He says: "But the question will sooner or later arise, and not alone in this, but in other similar cases—does sir land, held as it is held by this plaintiff, represent an ancestral share in the estate, or is it merely maintenance given to younger branches, at the pleasure of the head of the house? It is quite certain that if circumstances compelled the division of the

estate, the plaintiff would share by ancestral right." He then decided against the plaintiff's claim, upon which the case was brought before the Settlement Commissioner of Oudh, Mr. Currie; and he says: "It is shown that the descendants of Ojeeb Singh lived together till about 1264 Fuslee (1856-57), and that the appellant held possession of a village named Akberpore which forms a portion of this estate, paying the proceeds into the common fund. It is also shown that appellant held some sir, but there is no actual proof of appellant's having enjoyed a share of the general profits." Then he goes on to discuss the question whether the holding of sir land is a participation in profits, and he comes to this conclusion:—"In the present case then, the Court, being of opinion that the appellant was, up to 1264 Fuslee, a member of an undivided Hindu family living in common and sharing in common, holds that the cause of action in the case arose in 1264 Fuslee or such other date about that year when appellant and respondent quarrelled, and appellant was deprived of the rights which he had up to that time enjoyed. Being of this opinion, the Court does not consider it necessary that appellant should prove possession of a specific share, the possession of respondent being presumed to be the possession of the entire family."

It appears to their Lordships that the Settlement Commissioner was right in this opinion. If these brothers did live in commensality, and the funds of the estate which they respectively held, independently of the sir land, were brought into the common fund, and they participated in this fund by reason of their living in commensality, it was not necessary that the plaintiff should prove the possession of a specific share of the joint fund. "For these reasons," the Commissioner says, "the Court reverses the order of the Settlement Officer, and decrees the appellant a one-fourth share in Mauza Nawagaon, being the share to which he is entitled by ancestral right, and to which he lays claim."

An appeal was brought from that decision to the Financial Commissioner, the defendant upon that appeal being the appellant. Colonel Barrow, as the Financial Commissioner, states the grounds of appeal, and he says: "If the parties were an undivided

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family in the Nawabee within limitation, no doubt the Commissioner's order, reversing that of the Settlement Officer, is correct. It appears that in the Nawabee (1263 Fuslee, 1856), with in limitation, a separation took place, and respondent got only 150 bigas sir, but this does not invalidate his claim, for he was in the possession as a member of an undivided Hindoo family up to 1263 Fuslee (1856). He is, therefore, now entitled to his share. The proof of sepecific possession is not requisite. I uphold, therefore, the Commissioner's finding, decreeing 4-anna share to special respondent, subordinate to the zemindar, Shumshere Singh."

Colonel Barrow's judgment was given on the 24th September 1867. It appears that at that time Colonel Barrow was only officiating as Financial Commissioner, when he gave judgment affirming the decision of Mr. Currie; after that Mr. Davies appears to have come back and resumed his duties as Financial Commissioner. An application was made to Mr. Davies, who was then the Official Commissioner, to review the judgment which Colonel Barrow had given when he was acting as Financial Commissioner. Mr. Davies refused to grant a review, and on the 17th November 1867 rejected the application. Nothing was done after this until the 24th of April 1868, which was more than ninety days from the time of the original decision of Colonel Barrow, and more than ninety days even from the time when Mr. Davies rejected the application for review. Colonel Barrow at that time was again acting as, or had been appointed substantially to the office of, Financial Commissioner. At all events he was performing the duties of that office, and on that day an application was made to him for a review of his own judgment. Mr. Davies having rejected a review, an application was made to Colonel Barrow himself to grant a review. Upon that he says: "Review is asked for in this case on the grounds of a certain statement said to have been made by the special respondent in 1859, to the effect that they (the sharers) had been turned out of possession, sixteen or seventeen years before, by Shumshere Singh, meaning that the family had been separated. The statement is produced and read, showing that Shumshere Singh had turned them out before February 1844, and that they (the special

respondents) merely held their sir, &c. The translation of the deposition referred to is dated January 1859, and the plaintiffs (special respondents) loosely stated they had been sixteen years separated, which places them a year only out of limitation. I do not think that this statement would suffice to eject Luchmun, &c. from a share if they could otherwise prove that they had held the status of shareholders." The statement referred to was, however, before the Settlement Officer when he came to the first decision, and it was also before Mr. Currie as well as the evidence which had been given in the plaintiff's favor; the statement which the plaintiff had made, and which tended to show that the evidence was not correct, was before both those officers—the Settlement Officer who decided the case in the first instance, and the Settlement Commissioner, Mr. Currie; and it was also before Colonel Barrow himself when he gave his judgment affirming the decision of Mr. Currie. But the plaintiffs had given evidence to show that they were shareholders, and Mr. Currie had acted upon that evidence and found that they were shareholders, and had given them a decree in consequence. Mr. Currie says that "up to 1264 Fúslee (1856-57) appellant (Luchmun) was a member of an undivided family living in common and sharing in common, and that they only separated in 1264 when they quarrelled." The Financial Commissioner goes on: "There is no evidence on record to this effect: the trying officer indeed says that Luchmun has produced none to show that he had any status as a proprietor. There are eleven or twelve villages concerned in this decision. The Government demand on the same is Rs. 4,150" (that is, to show that the value of the estate was considerable). "Such important interest deserves full inquiry before shares can be decreed, and the quotation from Mr. Currie's judgment will form the subject of an issue for further trial. After the lapse of so long a time I regret to give the Courts the trouble of further inquiry, but in this instance it appears only just to special appellant to do so, for Luchmun, as far as the evidence yet goes, has not proved a good title to a share."

The case, then, was sent down for the purpose of trying whether the quotation from Mr. Currie's judgment, that the plaintiff

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was a member of an undivided family up to 1264 was correct or not. In reality the case was sent back to the Settlement Officer to try whether the decision of Mr. Currie upon appeal from the Settlement Officer upon a question of fact was correct or not. The case came before Colonel Barrow merely upon special appeal. He sent it back upon the ground that there was no evidence whatever given in support of that issue. There was, however, the evidence of the plaintiff himself upon oath. It appears to their Lordships that the Financial Commissioner was wrong in granting the review and remanding the case; and further, that he had no power to do so.

The right to apply for a review of judgment depends upon Act VIII of 1859, s. 376, which is as follows: "Any person considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been referred to a superior Court, or by the decree of a District Court," and so on, "and who, from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time such decree was passed, or from any other good and sufficient reason may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree."

Now what was the ground of application to Colonel Barrow for a review of his own judgment? He says that there was no evidence whatever before Mr. Currie in support of the fact that the plaintiff was a member of a joint family, but there was no allegation, when the application for the review of judgment was made, that the applicant had discovered any new matter or evidence which was not within his knowledge, or could not be adduced by him at the time the decree was passed.

Then was there any other good and sufficient reason? The only other good and sufficient reason appearing in Colonel Barrow's judgment was, that Mr. Currie had found that fact without any evidence to warrant it; but that is not correct.

But the application was made more than ninety days from the date of the decree, and it was made more than ninety days even from the time when Mr. Davies had refused to review Colonel Barrow's decision. Section 377 of Act VIII of 1859 enacts that

the application for a review shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and sufficient cause, to the satisfaction of the Court, for not having preferred such application within the limited period.

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Now if the ground for the application for review was, as stated by Colonel Barrow in his judgment, that Mr. Currie had found a fact without any evidence whatever in support of it, the defendant ought to have applied for the review of judgment within ninety days from the date of the decree. But in this case the second application for review was not made within that period. In the case of *Maharaja Mohesher Singh v. The Bengal Government* (1), it was held that a review granted after ninety days without sufficient ground was invalid. That, however, was in a resumption suit, and was not a case under Act VIII of 1859. It was under an old Regulation, and was not an express decision, although probably the same principle would apply to a case under Act VIII of 1859. There is, however, an express decision in the High Court of Bengal with regard to the application for a review under Act VIII of 1859—*Gunganarain Roy v. Goonomoonies* (2). The marginal note is: "The order of the Lower Appellate Court, admitting a review of judgment after the expiration of ninety days from the date of the decree, without showing whether there was sufficient cause proved to its satisfaction for the delay, was held to be illegal, and was set aside with the subsequent proceedings thereon."

Their Lordships approve of that decision, and consider it applicable to the present case. Colonel Barrow does not state that there was, or that it had been shown to his satisfaction that there was, sufficient cause for not having made the application for the review within the ninety days. According to the decision to which reference has been made, it appears that the review itself and all the subsequent proceedings under it were invalid.

The case, however, went down, and was retried by the Settlement Officer. It is unnecessary to go into the further proceed-

(1) 7 Moore's I. A., 309.

(2) 8 W. R., 184.

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ings. Their Lordships are of opinion that, even if the review had been properly granted, the subsequent proceedings and judgment were entirely wrong. The case is decided upon the ground that Colonel Barrow has not shown that it was proved to his satisfaction that there was a sufficient excuse for not having made this application for a review within ninety days from the date of the decree, and that the granting of the review and all subsequent proceedings under it were erroneous and invalid. The original decision of Colonel Barrow, upholding Mr. Carrie's decision of favor of the plaintiff, and awarding him a one-fourth share in this estate, must stand.

Their Lordships, therefore, will humbly advise Her Majesty that the last decision of Financial Commissioner, dated the 29th and 30th June 1868, be reversed, and that the first decision of the Financial Commissioner, dated the 24th September 1867, be affirmed.

Appeal allowed.

Agent for the appellants: Mr. T. L. Wilson.

Agents for the respondents: Messrs Young, Jackson & Co.

P. C.*
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Dec. 12 & 15

RAJA NILMONY SINGH DEO BAHADOOR (PLAINTIFF) v. KALEE
OHURN BHUTTACHARJEE AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

See also
15 B. L. R.
78.

Act VIII of 1859, s. 15—Declaratory Decree—Substantial Relief.

The words of s. 15, Act VIII of 1859, are to be interpreted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief if relief had been prayed for.

A suit by a party in possession for a declaration of title and to set aside, not any deed nor any act of the defendant, but a mere allegation on his part that he holds under a certain tenure, is not maintainable.

Appeal from a decision of a Division Bench (Kemp and Ainslie, JJ.) of the Calcutta High Court, dated the 29th August 1871, reversing a decree of the Deputy Commissioner of Manbhoom, passed on the 30th December, 1870.

*Present:—SIR J. W. COLVILLE SIR B. PEACOCK, SIR M. E. SMITH,
AND SIR R. P. COLLIER.

Mr. T. H. Cowie, Q.C., and Mr. Doyle for the appellant.

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None of the Respondents appeared.

The facts of the case are sufficiently set forth in their Lordships' judgment, which was delivered by

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NILMONT
SINGH DEO
BARADOOR
KALIA CHURN
BHUTTA
CHARTER.

SIR R. P. COLLIER.—This was a suit instituted by the Raja of Pachete against a great number—about fifty—of his ryots, “to,” in his own language, “obtain possession of 10 rekhs, or a 10anna share, of Mauza Raotara, Pergunna Para, under a mal title, by setting aside the false *mughali brahmottara* title stated by the defendants.” The defendants set up different defences; some of them alleged the *mughali brahmottara* tenure, which the Raja complained of their having set up; others repudiated any such tenure, and declared that they had never set it up, and therefore that the suit was brought unjustly against them; others did not appear. The case came in the first instance before the Assistant Commissioner of Manbhoom, who in their Lordships' opinion did not sufficiently distinguish between the different classes of defendants. He treated them substantially as all setting up this *mughali brahmottara* tenure, and framed his issue with that view. He found in the result in favor of the Raja, that the Raja was entitled to possession of the lands in suit, and that the defendants' allegation of *mughali brahmottara* holding should be set aside.

An appeal was then presented to the High Court, and in their Lordships' judgment the High Court scarcely sufficiently adverted to the distinct defences on the part of the various defendants; the case of some being that they had a *brahmottara* tenure, that of others being that they had not and never had set it up; as against those last it was necessary for the Raja to prove that they had set up a *brahmottara* tenure. The High Court reversed the decision of the lower Court, and the ground of their decision is expressed in the last paragraph of their judgment: “On the whole case we think that the onus being shifted “on the plaintiff to prove that these defendants had, since the “year 1197 (1790), paid at a variable rate, and that they have not “paid at the rate of Rs. 121-9 annas, as per settlement of 1197

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“(1790), he has altogether failed to do so. We therefore dismiss “the plaintiff’s case, and decree the appeal with costs.” In other words, the High Court appears to have found that the defendants had proved a *prima facie* case of a *mughali brahmottara* tenure, throwing upon the plaintiff the onus of rebutting that case, and that he had failed to sustain the onus thrown upon him. The decree of the High Court is in these terms,—“It is “ordered and decreed by the said Court that this appeal be “decreed, and the decree of the lower Court be reversed, and “that the suit of the plaintiff (respondent) as against all the “defendants be, and the same is, hereby dismissed.” Their Lordships do not think it necessary to determine whether or not the High Court were right in the conclusion they came to as to the proof, or the rebuttal of proof, of the *brahmottara* tenure, because in their Lordships’ opinion the judgment dismissing the suit is maintainable on totally different grounds. This is in substance a suit for a declaration of title, and it is a suit to set aside, not any deed nor any act, but a mere allegation of the defendants that they had a certain tenure. In their Lordships’ view such a suit is not maintainable. S. 15 of Act VIII of 1859 is in these words,—“No suit shall be open “to objection on the ground that a merely declaratory decree or “order is sought thereby, and it shall be lawful for the Civil “Courts to make binding declarations of right without granting “consequential relief.” A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for; and that doctrine has been applied to this clause in the Indian Act.

Now, applying that test in their Lordships’ opinion this suit is not maintainable. The Raja was not entitled to relief in the shape of an order giving him possession, inasmuch as he was in receipt of the rents and profits; and he sought for and could obtain no other description of possession than that which he had. He could not obtain relief by an order directing an enhancement of rent, inasmuch as the cognizance of suits for the enhancement of rent is confined to the Revenue Courts, and a certain procedure is assigned to claims of that kind in

those Courts. His requisition of a declaration of a mal title by setting aside the false *brahmottara* title alleged by the defendants, is really no more than this, that he should have his title, whatever it was, as a zemindar, free from the allegation of the defendants that they had some other title. If he had applied to set aside a deed set up by the defendants, impugning his ordinary title as a zemindar, then relief might be granted to him by cancelling that deed, but he cannot obtain relief in the shape of merely setting aside an assertion—an assertion, which for all that appears, may have been merely by word of mouth. On these grounds it appears to their Lordships that no relief could have been granted to him if he had prayed for it, and therefore that the suit was not maintainable. They think it right to add that even if no rule of law had carried the suit, still that, in their opinion, this was not a case in which, in the proper exercise of judicial discretion, a declaration of title should have been made.

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The real object of the suit would appear to be to obtain a general declaration against a great number of persons holding by different rights that they had no *brahmottara* tenure; of which declaration the Raja might avail himself in proceedings to be taken in the Revenue Court in suits for the enhancement of rent. It was, and will continue to be, open to the Raja to institute any actions he may think fit in the Revenue Court for the purpose of enhancement of rent against all or any of these his tenants: but each of these cases must be tried upon its merits, and ought not to be prejudiced by a declaration such as he has sought to obtain.

Under these circumstances their Lordships, for the reasons given, are of opinion that the decree of the High Court was right, and they will humbly advise Her Majesty that that decree should be affirmed. It is scarcely necessary for their Lordships to add, that the decree being affirmed on these grounds, no adjudication has been given in favor of either party upon the question of *mughali brahmottara* tenure:

Appeal dismissed

Agents for the Appellants: Messrs Barrow and Barton.

P.C.*
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Nov. 20.

JUGGURNATH SAHOO AND OTHERS (DEFENDANTS) v. SYUD SHAH
MAHOMED HOSSEIN AND OTHERS (PLAINTIFFS).*

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Limitation—Act XIV of 1859 s. 1, cl. 15, & s. 5—Laches—Estoppel.

See also
15 B. L. R.,
App. 13.

The laches of a mortgagor in taking no steps for many years to enforce his alleged rights, may afford evidence against the existence of those rights, but cannot estop him from asserting them, if they do exist, at any time within the period of sixty years allowed by s. 1, cl. 15, Act XIV of 1859.

A defendant who seeks to protect himself by the provisions of s. 5 Act XIV of 1859, against the claim of a mortgagor suing within sixty years to recover mortgaged lands, must show clearly that he or the person from whom he derives his title was a *bona fide* purchaser.

Radanath Das v. Elliott (1), followed.

On account of the plaintiff's laches, the Judicial Committee disallowed mesne profits prior to the date of the institution of the suit; which had been allowed by the High Court.

APPEAL from a decision of the High Court at Calcutta (Norman, offg. C.J., and L. S. Jackson and Ainslie, JJ.), dated 13th March 1871, affirming a decision of the Subordinate Judge of Patna, dated the 4th December 1869.

The plaintiffs sued as representatives of the estate of one Bibee Mujo, to recover possession of a $\frac{1}{4}$ anna share in certain parcels of land which had been mortgaged to the predecessors in estate of the defendants by an usufructuary mortgage, alleging that the mortgage debt had been satisfied out of the usufruct. They also claimed to be allowed mesne profits for six years prior to the institution of their suit, in respect of their having been wrongfully kept out of possession after the mortgage had been satisfied, and also from the date of suit to the date of their being restored to possession.

The defendants, on the other hand, claimed to hold the land in question absolutely, and free from all right of redemption, as

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, SIR E. P. COLLIER, AND SIR L. PEEL.

(1) 6 B. L. R., 530; S. C., 14 Moore's L. A., 1

purchasers from the heirs of the mortgagees, or their assignees, who had themselves acquired the proprietary right under a deed of sale bearing date the 25th October 1841, and purporting to have been executed on behalf of Bibee Mujo by her mukhtar.

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The principal issues raised in the Patna Court were : 1st—Whether the suit was barred by limitation ? and 2nd—Whether the deed of sale put forward by the defendants was proved ?

The Subordinate Judge held that the suit was not barred by limitation, and found that the alleged deed of sale, as well as the mukhtarnama put forward in support of it, were forgeries. He accordingly gave the plaintiffs a decree for possession and for mesne profits. On appeal this decree was affirmed by the High Court, and the defendants appealed from that decision to Her Majesty in Council.

Mr. *Doyle* (Mr. C. *Arathoon* with him) for the appellants, contended that the lower Courts were wrong in finding the deed of sale by Bibee Mujo not to be proved. Under the circumstances of the case, the onus of disproving the deed should have been thrown on the plaintiffs, who had stood by for many years and allowed innocent purchasers to buy from the recorded proprietors without notice of their claim. With respect to a moiety of the lands in dispute, limitation under s. 5, Act XIV of 1859, must be taken to have run against the plaintiffs from the year 1844, when that moiety was transferred by the person then in possession to his wife in satisfaction of her claim for dower. In any view of their case the laches of the plaintiffs would disentitle them from being allowed mesne profits.

The respondents did not appear.

The judgment of their LORDSHIPS was delivered by

SIR J. W. COLVILLE.—This is a suit by the heirs and representatives of a Mahomedan lady, named Bibee Mujo, to recover possession of property comprised in a *zur-i-pesghi* lease from the defendants, who claim to be purchasers for value of the property in dispute. The title of the plaintiffs is, in fact, founded upon a right to redeem, although the suit is not exactly in the form of an ordinary redemption suit.

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The title of the plaintiffs is thus derived. Some time in the year 1814, one Khadim Hossein mortgaged the whole of the mauzas, of which a share is claimed in this suit, by a *zur-i-peshgi* lease, to one Sheikh Emam Buksh. The *zur-i-peshgi* was for seven years, and stipulated that out of the gross proceeds of the village, 5 annas should be paid as *hakajiri* to the mortgagors, and the remainder be retained by the mortgagees; the amount thus coming to the mortgagees be received by them in lieu of interest. Khadim Hossein died, and a dispute afterwards arose among his heirs, or persons claiming to be his heirs, which was finally settled by a compromise in the year 1817. Under that arrangement, his wife, Bibee Emamun, became entitled to $7\frac{1}{2}$ annas of his interest in the mortgaged property, Bibee Mujo became entitled to $4\frac{1}{2}$ annas, and Amjed Hossein, the nearest male relation, to 4 annas. After that, though it does not appear very distinctly at what time, an arrangement is admitted to have been made, by which, as between the mortgagors and the mortgagees, the original mortgage was treated as three distinct mortgages, in the proportions in which the estate of Khadim Hossein had been divided under the compromise above mentioned. The result was that Bibee Mujo became solely entitled to the equity of redemption in $4\frac{1}{2}$ annas of the mortgaged property, upon the payment of a similar proportion of the original mortgage debt.

It is admitted that Amjed Hossein unquestionably sold the equity of redemption in his 4 annas to the persons through whom the appellants derive their title. The share of Bibee Emamun seems to have been redeemed by her, or by her representatives, as early as the year 1844, upon a suggestion that the whole of the mortgage debt for which she was liable had been satisfied by the retention of the *hakajiri* coming to her, or in some other manner. But the contention on the part of the plaintiffs in this suit, the respondents on the present appeal, is, that the equity of redemption as to her share remained in Bibee Mujo, and that, by reason of the retention of the *hakajiri* due and owing to her, the whole of her share of the mortgage debt has been satisfied, and that, therefore, her representatives are entitled to recover possession of her share of the mauzas in question with six years' mesne profits.

The title set up by the defendants is as follows:—The original mortgagees sold their interest to sheikh Taleb Ali and his two sons, Sheikh Fuzul Ali and Sheikh Ashghur Ali. They thus became the mortgagees. Sheikh Taleb Ali died, and his interest descended to his two sons. It is alleged on the part of the defendants that Bibee Mujo, in the year 1841, sold her interest in the 4½ annas, upon terms similar to those upon which Amjed Hossein had sold his interest in his 4 annas, to Sheikh Fuzul Ali and Sheikh Ashghur Ali; and that by subsequent purchases and conveyances the absolute interest which had thus been acquired by Sheikh Fuzul Ali and Sheikh Ashghur Ali in the 4½ annas share of the mauzas, which is the subject of this suit, had become vested in some one or more of the appellants as purchasers for value, and without notice.

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A point which has been taken as to a moiety of the property in dispute makes it necessary to state with some precision what was the devolution of title as to that moiety. The whole interest, whether absolute or merely by way of mortgage, which was vested in Fuzul Ali and Ashghur Ali, was divided between them in equal moieties. And it is alleged that, on the 29th of July 1844, Fuzul Ali transferred his interest to his wife by a *bai-mukasa* or conveyance of property, in satisfaction of her rights of dower; that this wife, whose name was Bibee Zenut, exercised rights of ownership over the property, having mortgaged it on the 8th of December 1849; and that, on the 10th of January 1859, *i.e.*, within twelve years before the institution of the suit, she transferred her absolute interest in the property to the two first appellants on the record. Of the other moiety of the property, being that which was vested in Sheikh Ashghur Ali, it is only necessary to say that by various conveyances the whole of it, with the exception of the small portion afterwards mentioned, had, before the year 1860, become vested in the principal appellants, being the first and second on the record. That small portion, having been purchased at an execution sale by a Mahomedan lady, afterwards became vested in the appellant Burra Toonissa.

From this statement of the title set up by the defendants it is obvious that the material question to be determined in the

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cause was the validity of the alleged conveyance, of the equity of redemption by Bibee Mujo to Ashghur Ali and Fuzul Ali. Against the validity of that instruments we have the decision of the two Indian Courts, both concurring in finding that, if not a fabrication, as it was found by the Judge of first instance to be, it cannot be treated as established against Bibee Mujo or her representatives.

The first consideration upon that point is, whether sufficient grounds have been presented before their Lordships to induce them to deviate from their general rule not to disturb such a finding of fact by two Courts in India. If they are to look merely at the evidence of the execution of that conveyance, they are bound to say that, so far from thinking that there is any ground for an exception being made to the general rule, they are of opinion that upon that evidence the conclusion of the High Court would be correct. To fix Bibee Mujo with the deed, it is necessary to establish the mukhtarnama, and the evidence of the execution of that instrument by her is of the slightest and most unsatisfactory character. The evidence, again, of the execution of the deed as it is stated to have been executed by the mukhtar appointed by the mukhtarnama, and of the subsequent admission of the deed by the lady, is also of a very suspicious character. It appears, moreover, that the deed was not registered even before the kazi for several months; and that it was not registered at all, as the conveyance by Amjed Hossein had been, in the office of the Registrar of Deeds. It appears further that in 1843, upon an application made to the Collector by Fuzul Ali and Ashghur Ali for mutation of names, on the suggestion of such a conveyance having been executed by Bibee Mujo, a petition of objections disputing such execution was filed by that lady's agent, and that the applicants Fuzul Ali and Ashghur Ali thereupon allowed their proceeding to drop.

The only doubt which their Lordships have felt on this part of the case has been founded on the laches of Bibee Mujo and her representatives in taking steps to enforce their rights as mortgagors for so many years; and if there had been a substantial conflict of evidence touching the execution of the

deed, their Lordships might have thought that the Courts in India, in weighing that conflicting evidence, had hardly given sufficient weight to the inferences which arise from such laches. But their laches cannot estop the parties from asserting their right, if it exists. The question is one of title, and the right to assert that title is to be determined by the Law of Limitation as it stands. The law, wisely or unwisely, has given to mortgagors the long period of sixty years within which to bring their suit; and no Court of Justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights. Their Lordships, after weighing the whole of the evidence, and giving full effect to the laches of the parties, cannot say that the execution of this deed by Bibee Mujo has been proved. They must, therefore, deal with the case on the assumption that the two Courts below were right in finding that material link in the title of the defendants to be wanting.

If that be so, it remains to be considered whether Mr. Doyne's argument as to the Statute of Limitations can prevail. He has not attempted to show that the Courts below were wrong—in fact it could not be shown that the Courts below were wrong—in finding that the suit as a whole was not barred by the Statute of Limitations. It follows that the plaintiffs (the respondents) can assert a title to redeem the portion of the property which fell to Ashghur Ali; since, if the conveyance of the equity of redemption to him is not established, he had nothing but a mortgage title to convey; and there was no conveyance even of that to the appellants, except within the period of twelve years. The question raised by Mr. Doyne are, whether a different rule ought not to be applied to that portion of the property which was vested in Fuzul Ali, and which passed by the *bai-muhasa* to his wife, and from her to the appellants, the transfer to the wife having occurred more than twelve years before the suit; and whether the suit as to this portion is not barred by the 5th section of Act XIV of 1859. Upon that point their Lordships, during the argument, entertained some doubt; but they are of opinion that they can make no decision between the two classes of property, for the following reasons. In the first place, the case which has been made here does not really appear to

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have been made in either of the Courts below. It certainly was not made in the Court of first instance ; and though it was said that it was raised by the grounds of appeal, it appears to their Lordships that the first ground of appeal points to a general bar of the whole suit ; and the observations of the learned Judges of the High Court in giving their judgment show that the argument before them must have proceeded upon that ground. Moreover, upon the merits of the question their Lordships are of opinion that the supposed bar to the suit is not established. In the case of *Radanath Das v. Elliott* (1), in which the judgment was given by the present Lord Chancellor, the principles upon which the 5th section of Act XIV of 1859 is to be applied to such cases as the present are very clearly stated. His Lordship said : " But their Lordships cannot fail to observe that the provisions of this section are of an extremely stringent kind. They take away and cut down the title which *ex hypothesi* is a good title, of the cestui que trust, or of a person who has deposited, pawned, or mortgaged property ; they cut down that title in regard to the number of years that the person would have had a right to assert it ; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section as the person who ought to be protected. Their Lordships think that in order to claim the benefit of this section the defendant must show three things : first, that he is the purchaser according to the proper meaning of that term ; second, that he is a *bonâ fide* purchaser ; and third, that he is a purchaser for valuable consideration." Now if the twelve years to be computed under the 5th section are to run from the transfer by the *bai-mukasa* to Bibee Zenut, it is necessary to show that Bibee Zenut was a *bonâ fide* purchaser, and of that there is no proof ; on the contrary, the transaction is open to all the suspicions which attach to transactions between a Mahomedan and his wife : and the necessity of proving that the purchaser is a *bonâ fide* purchaser makes the absence of a particular plea raising the particular defence now set up extremely material, because if

(1) 6 B. L. R., 530 ; S.C., 14 Moore's A. A., 1.

that point had been distinctly raised in the Courts below, it would have been open for the plaintiffs to dispute the *bonà fides* of that transaction, and to have it investigated. 1874

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It seems, therefore, to their Lordships, that they cannot give any greater effect to the transfer of the share of Fuzul Ali than they do to that of the share of Ashghur Ali.

There is, however, one point upon which their Lordships are not satisfied with the present decree. They cannot but remark that the laches of the plaintiffs in the case has been very great, and that the case is far from being a clear one. They have also to remark that there are no grounds for imputing to the appellants, the actual holders of the property, a knowledge of any fraud that there may have been in the supposed transfer to their vendors. They have also to remark, that, in strictness, some exception might have been taken to the form of the suit considered as a redemption suit; although it is admitted at the bar that there are no grounds for a further investigation of the question whether the mortgage-money had been paid off at the date of the suit, and that it may be considered to have been paid off. Their Lordships, however, cannot see that there was sufficient ground for allowing the plaintiffs, who have been guilty of such laches, to recover, as against purchasers for valuable consideration, without notice of their title, mesne profits from any date earlier than that of the institution of the suit. They think, that, on the institution of the suit, the laches of the plaintiffs in enforcing their rights ceased, and that the mesne profits from that date should follow the result.

Their Lordships will, therefore, humbly advise Her Majesty to confirm the decree under appeal, with the exception that the amount of mesne profits should be reduced to the mesne profits which have been received since the institution of the suit. The appellants having, to the extent of a reduction in the mesne profit, succeeded on the appeal, and the respondents not having put in a case or appeared at the bar, their Lordships will make no order as to the costs of this appeal.

Decree confirmed except as to mesne profits.

Agent for the appellants : Mr. T. L. Wilson.

RAM SABUK BOSE (ONE OF THE DEFENDANTS) v. KAMINEE KOOMAREE DOSSEE (DAUGHTER AND HEIRESS OF RAJ KRISHNO SAOOR, ONE OF THE PLAINTIFFS) AND ANOTHER (PLAINTIFF) AND OTHERS (DEFENDANTS)

P.C.*
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Dec. 11 & 12

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Regulation VIII of 1819 s. 8, cl. 2—"Substantial Persons"—Service of Notice—Special Leave to appeal to Privy Council—Practice.

See also
15 B. L. R.
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The provisions of cl. 2, s. 8, Regulation VIII of 1819, with regard to the notification of the sale of a patni talook for arrears of rent under that Regulation, that the serving peon shall "bring back the receipt of the defaulter or his manager for the same. or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot," are merely directory, and where there is proof that the notice was in fact served, the sale will not be vitiated by non-compliance with any of these provision, *e. g.*, as where one of the witnesses attesting the service of the notice turns out not to be "substantial."

A respectable man, of good character, living and well known in the neighbourhood, may properly be considered a "substantial person," within the meaning of cl. 2, s. 8. of the Regulation: it is too limited a construction of that clause to hold that the word "substantial" must be taken to mean a wealthy man, from whom damages could be recovered by the patnidar supposing the attestation to be false.

Where special leave to appeal to the Privy Council is granted upon a petition in which material mis-statements are made, objection should be taken by the respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on. Where it was not clear that the material mis-statements in the petition had been made with an intention to deceive, and the objection to the appeal was only taken at a late stage of the hearing, the Judicial Committee declined to dismiss the appeal, but refused the appellant the costs of the appeal.

APPEAL by special leave of Her Majesty in Council, from a judgment of the Calcutta High Court (Kemp and Glover, JJ.), dated 18th February 1865, reversing on review a judgment of the same Judges passed in special appeal on the 28th July 1864.

The suit in which the appeal arose was instituted in the year

Present:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER,

1861, in the Court of the Principal Sudder Ameen of the 24-Pergunnas by the respondent Gopal Krishno Shoor, and Raj Kriahno Shoor, since deceased, against the respondents Muddun Mohun Haldar and Juggodumba Dossee, and Ram Sabuk Bose, the present appellant. The object of that suit was to set aside the sale of the patni talook Juggutbullubpore, of which the plaintiffs had been the patnidars, and which had been sold for arrears of rent at the instance of Muddun Mohun Haldar, the zemindar, under the provisions of Regulation VIII of 1819, and purchased by Ram Sabuk Bose.

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The plaintiff alleged in their plaint that this sale had been fraudulently brought about by the said Muddun Mohun Haldar, who, without issuing the notification of sale required under the Regulation cited, had "caused a forged receipt of the service of the said notification to be stealthily made, and the purchased property benami in the name of his servant, the defendant Bose."

The name of Juggodumba Dossee was introduced into the plaint, on an allegation that she was the real zemindar of the talook in dispute, and that the defendant, Muddun Mohun Haldar, held benami for her.

Muddun Moun Haldar, by his written statement, denied that the talook was the benami of Juggodumba Dossee, and that Ram Sabuk Bose was his servant, or had purchased on his account. He alleged that arrears of rent were due by the patnidars, and maintained that the provisions of the Regulation with respect to the service of the notification of sale had been duly complied with. The defendants Juggodumba Dossee and Ram Sabuk Bose likewise filed written statements, in which the former disclaimed all interest in the patni talook, and the latter denied that he was the servant of Muddun Mohun, or had purchased on his behalf.

The Principal Sudder Ameen, finding on the evidence that the provisions of the Regulation had been complied with in making the sale, dismissed the suit on 18th May 1863. That decision was confirmed, on regular appeal, by the Judge of the 24-Pergunnas on the 18th November 1863. The plaintiffs thereupon presented a special appeal to the High Court, which,

1874 on the 28th July 1864, was dismissed by a Division Bench (1).
 RAM SABUK Subsequently, however, the same Court, on a review of their
 ROSE judgment on the 18th February 1865, decreed the appeal
 v. and set aside the sale, ordering the defendant, Muddun Mohun
 KAMINER Haldar, who had alone appeared on the review, to pay the costs
 KOOMAREE of the plaintiffs in the High Court (2).
 DOSSEE.

Muddun Mohun Haldar applied for a further review of his last judgment; but, on the 3rd February 1866, his application was rejected. Ram Sabuk Bose took no part in this application; but, on the 28th July 1866, he applied to the High Court to admit an appeal to Her Majesty in Council, which application passed for the appeal to be admitted; but afterwards, on its was at first (on the 22nd February 1867) allowed, an order being appearing that the application had not been made within six months from the date of the judgment passed on review, the order, admitting the appeal, was recalled on the 8th June 1867.

Subsequent to this, but on what precise date does not appear, Ram Sabuk Bose applied to Her Majesty in Council for special leave to appeal, on a petition in which he stated the fact of his application to the High Court for a further review of the judgment of the 18th February 1865, and its rejection; and his petition to the High Court to admit an appeal to Her Majesty in Council with its admission and its being afterwards recalled as the time limited for admitting an appeal had expired. The petition further set forth that, according to the practice obtaining in the High Court down to the time when he applied for leave to appeal, the period for admitting appeals to Her Majesty in Council was calculated from the date of the order rejecting an application to review the decree complained of, and that this practice had only been altered on the 11th September 1866, by a decision of the Full Bench (3), which ruled that the time for appealing should be calculated from the date of the decree complained of, and not from the date of the order rejecting an application for the review of such decree. Accord-

(1) W. R., Jan to July 1864, 382.

(2) 2 W. R., 188.

(3) *Soudamines Dossee v. Maharaj Dheeraj Mahatab Chund Bahadoor*,

B. L. R., Sup. Vol., 585.

ing to the practice formerly prevailing, the petitioner submitted that his application for leave to appeal was in time.

On the representations made in this petition, special leave was, on the 14th January 1871, granted to the petitioner to prosecute his appeal.

Various objections, which had been originally taken by the plaintiffs to the validity of the sale of the patni were disposed of in the Courts of the Principal Sudder Ameen and the Judge of the 24-Pergunnas; and, the case having come before the High Court on special appeal, no question of fact remained in issue. The single issue of law considered by the High Court in the judgment of the 18th February 1865, was, as to the meaning to be given to the words "substantial persons," used in cl. 2, s. 8, Regulation VIII of 1819. The passages of the judgments of the lower Courts referred to in the arguments of Counsel, will be found set forth in their Lordships' judgment.

Mr. *Doyns* for the appellant.—The word "substantial" was correctly construed by the Principal Sudder Ameen, by the Judge of the first Court of appeal, and in the first judgment of the High Court. The interpretation given to it in the judgment passed on review was too narrow, and was not warranted by the terms of the Regulation. Moreover, the High Court had dealt only with the case of three out of seven witnesses who had attested the receipt of the notice of sale. If doubt existed as to the substantial character of these three, the remaining four might have been shown by supplementary evidence to have been substantial. Leave to offer such evidence was asked in the application for further review rejected on the 3rd February 1866. Assuming that the terms of the Regulation had not been strictly complied with, it sufficiently appeared, and had been found as a fact by the lower Courts, that the notification had been duly made, and that the patnidar had full notice and information of the intended sale of the patni in default of payment of the arrears. It would be inequitable under such circumstances to set aside the sale on a mere matter of form as against a *bonâ fide* purchaser. The learned Counsel relied upon the

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1874 decision of Peacock, C.J., in the case of *Sona Beesee v. Lall Chand Chowdhry* (1).

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Mr. J. Graham for the respondents Sreemutty Kaminee Koomaree Dossee and Gopal Krishna Shoor.—There has been a total failure to comply with the requirements of the Regulation in regard to service of notice of sale on the patnidars. [Sir M. E. SMITH.—The Courts below have not found that the patnidars had no notice. It is a pure question of form.] The Act, as prescribing penal sales of property, must be strictly followed, and this has not been done. The application to admit the appeal, moreover, was out of time. The appellant had taken no part in any of the proceedings in the High Court between the 18th February 1865, when the High Court gave judgment in favor of the respondents, and the 28th July 1866, when he petitioned the High Court for leave to appeal to Her Majesty in Council. During that interval proceedings had been taken by Muddun Mohun Haldar, but in these the present appellant had not joined. This was opposed to the statements made by him in the petition he forwarded to the Privy Council, in which it was represented that he had taken part in these proceedings. Leave to appeal had, in fact, been given on untrue allegations. [Sir B. PEACOCK.—Should you not have taken this objection before? The case has been argued now, and expenses incurred.]

Mr. Doynes in reply. [Sir J. W. COLVILLE.—“Have you not got leave to appeal on a statement that you took proceedings which you did not take? Had it appeared in the petition that Ram Sabuk had not been a party to the previous petitions, I would not have granted leave to appeal.” His Lordship referred to the cases of *Wilson v. Callender* (2) and *Sibnarain Ghose v. Hullohdhur Doss* (3), which the Judicial Committee had dismissed without hearing, on it appearing that leave to appeal had been obtained upon allegations unfounded in fact.] Ram Sabuk's interests were identical with those of Muddun Mohun. [Sir J. COLVILLE.—I cannot see that.] S. 337 of Act VIII of

(1) 9 W. R., 242.

(2) 9 Moore's P. C., 100.

(3) *Id.*, 54.

1859 makes it unnecessary for more than one of several joint plaintiffs or defendants to take steps for appeal or review. It was unnecessary for Ram Sabuk to appear when Muddun Mohun, his co-defendant, was carrying on the case. [Sir B. PEACOCK.—If Ram Sabuk succeeds now, the order passed by the High Court for Costs against Muddun Mohun will be set aside. What *locus standi* have you to get these costs reversed?]

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The objection now taken for the respondents is only faintly hinted at in their printed case, and is not set forth in their "reasons." The respondents should have come in before and asked that the special leave given to appeal should be withdrawn. That leave was given nearly four years ago. It would be unreasonable to allow the objection to prevail now, after the case has been heard, and after all the costs of the appeal have been incurred.

The judgment of their LORDSHIPS was delivered by

Sir M. E. SMITH.—In this case their Lordships, having heard the argument on the appeal, propose to give judgment upon its merits, and some observations will subsequently be made on the objection which was taken to the statements in the petition of appeal.

The suit was brought by a patnidar to set aside the sale of his patni talook, called Juggutbullubpore, which had been sold for arrears of rent through the Collector, under the provisions of Regulation VIII of 1819, and the defendants to the suit were the zemindar, Muddun Mohun Halder, and the purchaser at the sale, Ram Sabuk Bose. The plaint charged fraud on the part of the zemindar, and the purchaser in the proceedings previous to the sale, and charged that the receipt of the notice which was served under the provisions of the Act had been forged. Various objection taken to the sale have been disposed of in favor of the defendants, and one only remains for consideration in the present appeal; that is, whether the witnesses who have signed the receipt are substantial persons within the meaning of the Regulation.

The Regulation provides, in the 2nd clause of the 8th section, for the manner in which the notice of sale shall be

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served and published. It directs that it shall be stuck up in some conspicuous part of the cutcherry of the zemindar, and it also provides for publicity and service in the cutcherry of the defaulter. It is with the latter only that it is necessary to deal in the present appeal. The Regulation says :—"A similar notice shall be stuck up at the Sudder cutcherry of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the cutcherry, or at the principal town or village upon the land of the defaulter. The zemindar shall be exclusively answerable for the observance of the forms above prescribed : and the notice required to be sent in to the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot."

It appears that the receipt of the defaulter could not be obtained. His gomasta was seen, but he refused to give one ; and thereupon the peon obtained the signatures of seven persons, who, it is alleged, resided in the neighbourhood. At the hearing before the Principal Sudder Ameen, evidence was given as to the residence and the status of three of those seven, and the Principal Sudder Ameen, being satisfied that they were substantial persons within the meaning of the Regulation, thought it unnecessary to go in to evidence with respect to the other four ; and he found in very distinct terms these three persons resided in the neighbourhood, and were substantial persons. This is his finding upon the facts :—"The plaintiffs take exception to the above seven persons not residing in the neighbourhood of the defaulter's mehal. To this it would be observed that Warris Mollah, one of the seven persons, above alluded to, was the mundul of Juggutbullubpore, and Goluck Chaukidar was the chaukidar of the village. These two certainly are what the law calls 'substantial' men. As regards Kabel, though, not a man of much consequence, he was known to carry on the trade of a tailor in the village ; consequently, a receipt signed by, among others, three such men, as Warris, Goluck Chaukidar,

and Kabel, must be considered a sufficient proof for the service of notice. A more respectably signed document cannot be from the circumstances of the country (the respectable portion of every community being at all times averse to appear in a Court of Justice), expected." The objection at their Lordships' Bar was directed only to one of these witnesses, Kabel, who carried on the trade of a tailor. It has not been contended that the other two did not satisfy the requirements of the Statute, although in the judgment under appeal it appears to have been held by the High Court, contrary to its former decision on the same point, that two of them did not satisfy its words.

There was an appeal from the finding of the principal Sudder Ameen to the Judge of the 24-Pergunnas; and Mr. Beanfort, the Judge of the 24-Pergunnas, affirmed the decision. He affirmed it upon two grounds: first, upon the facts, and then that supposing the witnesses did not satisfy the Statute, still notice having been really served upon the plaintiff, the patnidar, as was proved in the cause, through his gomasta, the non-compliance with the direction of the Statute would not under the circumstances, vitiate what had been done. His finding is, "I am of opinion that the appellants have failed to show any sufficient ground for rejecting the receipt. When the gomasta, who was in the cutcherry, refused to give a receipt, the peon brought the guru of the village, and made him write a receipt under a tree close by, and then he got some of the bystanders to sign the receipt. The evidence proves these facts, and proves that the three persons who were called as witnesses at the trial of the case in the lower Court saw the notice affixed to the door; and I find no ground for holding that they are not substantial within the meaning of the law; I think that all that is required is good evidence to the fact of the publication of the notice on a certain date, and that that has been supplied in this case;" therefore he affirmed the judgment of the Court below upon the fact that these witnesses were substantial men. Then he goes on thus:—"I would go further and say that the directions of the law are intended for the guidance of the Collector only." Then he gives his reasons: "Before putting up the patni

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tenure to sale he must require proof that the notice was duly served, and the law says that such proof must be of such and such a nature. The Collector is not required to take evidence; he has to examine merely the written documents produced by the zemindar, and if the proof appears to be *primâ facie* good, the patni is sold on the responsibility of the zemindar. Then, if the patnidar has recourse to the Civil Court, the issue is not whether the proof adduced to the Collector at the time of sale was strictly within the words of the law, but whether the evidence adduced before the Court to prove the service of the notice on or before a certain date is credible and satisfactory. The reasonable object of the law is that the defaulter should have timely notice of the intention to sell; and if it be proved that such notice was given to the satisfaction of the Court, the number of witnesses present, their actual status in social life, and the distance of their dwelling-houses, are points which are immaterial." It is to be observed that on this point there is a decision of the High Court when Sir Barnes Peacock presided in it, to the same effect. In the case of *Sona Beebee v. Lall Chand Chowdhry* (1), the Chief Justice says:—"This was a suit to cancel a sale of an under-tenure under Regulation VIII of 1819. The material part of cl. 2, s. 8, Regulation VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the mofussil shall be served. The zemindar is exclusively answerable for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peen shall bring back the receipt of the defaulter or of his manager, or in the event of his inability to procure it, that he shall obtain that which by the Regulation is substituted for it, is merely directory, and if not done does not vitiate the sale, provided the notice is duly served."

Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock, confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of this patni could be set aside, because one of the witnesses to

the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance.

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The patnidar was not satisfied with these two decisions ; although the point is certainly small and narrow, whether this tailor was a substantial man or not, he appealed to the High Court. The two Courts below having found that in point of fact Kabel was a substantial person, his appeal could only be upon matter of law,—namely, that they had misconstrued the Regulation and the meaning of the word “substantial.” Upon this appeal to the High Court, he at first fared no better than he had done in the Courts below, and a Division Bench of the High Court affirmed the two former judgments, and for reasons which to their Lordships’ minds are perfectly satisfactory. Having noticed some of the objections, which are not now relied upon, they say (1):—“Next, as to these witnesses’ respectability. The word used in the Regulation is ‘substantial,’ meaning, of course, men who have some status in the community, men of local influence or importance, or respectability. We think that the law has been complied with on this point also. One of the witnesses is the mundul, the head man of the village; another is the chaukidar, an official whose attestation is always considered as the best possible in all matters connected with service of notice.” It is well to call attention pointedly to this finding as to the chaukidar, because it is entirely inconsistent with the decision of the same Division Bench upon review, where they considered that the chaukidar is not a substantial witness within the meaning of the Act. “The third appears so be a tailor, residing temporarily at the place, but who lives in the neighbourhood. This man is declared to be not a proper witness. We do not see why the man is not to be considered competent to attest the serving of notice. He appears to be a respectable man, though not a rich one; and besides, the phrase ‘substantial,’ on which special appellant lays so much stress, must be taken comparatively. In a small village the measure of a ‘substantial’ witness will, of course, be much lower than in a place of importance.”

(1) W. R., Jan to July 1864, 382.

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The patnidar, still dissatisfied, applied for a review of that judgment, and upon the review, the Court, consisting of the same two Judges, without much reference to or discussion of their former judgment, reversed it upon grounds to which I will now refer. In order to see upon what grounds the Court really acted in thus reversing their former judgment, it is necessary to say that they refer in their judgment to the contention of Mr. Paul, the counsel for the appellant, in this way (1):—"It is contended by Mr. Paul, the learned counsel for the applicant for review, that the law requires that the attesting witnesses must be 'substantial,' that is to say, responsible, moderately wealthy men, against whom, in a case of false attestation, the party injured may have his remedy in a suit for damages." This is what they observe on the evidence:—"Now, in this case, the attesting parties are sufficient in number, and they reside in the neighbourhood, but, with the exception of the mundul, the rest are not what can be called substantial persons. One is the chaukidar of the village, and the other a *thika* tailor. The Legislature invested the zemindar with the power of bringing subordinate patnis to sale, and made him exclusively answerable for the due observance of the prescribed processes under which such tenures could be brought to sale. To protect the patnidar from fraud, it was enacted that the notice of sale must be attested by three substantial persons. Now it is clear that, unless the attesting parties answer to the common meaning to be put upon the word 'substantial,' the patnidar would be wholly without remedy in case of false attestation." Now the Court, this being a special appeal, could only decide upon some matter of law, and the matter of law which they appear to rule upon the construction of this Act is that the word "substantial" means a wealthy man from whom damages could be recovered by the patnidar, supposing the attestation to be false.

Their Lordships think that this is too limited a view. It is, no doubt, desirable that men of property should sign these receipts if they can be obtained; but wealth is only one element in the position and status of the witness, and if he lives in the neighbourhood, and if he be a respectable man and of good

(1) W. R., 189.

character, their Lordships see no reason why upon evidence appearing of such facts, of which the Judge in each case must satisfy himself, the Judge, in estimating the position of the man, may not properly come to the conclusion that he is a substantial person. In the present case, the evidence appears to show that the man objected to carried on the trade of a tailor, that he had lakhiraj lands, that he lived in the neighbourhood, was well known, and was (to use a description built up of many circumstances) a "respectable" person. Their Lordships think that upon such evidence the Judge of first instance and the Judge of the 24-Pergunnas, who had a right to review his decision on questions of fact, might properly come to the conclusion that the witness was a substantial man. Their Lordships, therefore, think that the first judgment of the High Court was more correct than the last.

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On these grounds their Lordships have come to the conclusion to reverse the second judgment of the High Court upon the review; but, inasmuch as the zemindar Muddun Mohun has not appealed from that judgment, they see no reason to give him relief, so far as the order affected him personally only; that is to say, so far as it ordered him to pay the costs: and, therefore, the reversal of the judgment will be without giving any right to him to have any costs that he may have paid under it refunded.

Their Lordships have given very serious attention to the objection raised by Mr. Graham, on the part of the respondents, to the inaccurate statements in the petition for leave to appeal to Her Majesty. The appeal was made to Her Majesty upon special grounds, one being that the question was of considerable practical importance upon the construction of the Regulation. The petitioner was obviously out of time, and he could only obtain leave to appeal by excusing that lapse of time. Some of the statements in the petition are clearly inaccurate. It is stated, among other things, that the petitioner himself had applied for review of the judgment now appealed from on the 3rd of February 1866, and that the learned Judges of the Division Bench differed in opinion as to the propriety of allowing the application, and did not allow it; and he introduced the fact of that petition to the High Court as an excuse for a part

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of the delay, alleging further that, according to the then understood practice of the Court, which he says was afterwards changed, the application was in time. It turns out that the statement is inaccurate in this, that he did not petition the Court for a review of the judgment at all, but that the petitioner was the zemindar Muddun Mohun. Now, when he came to excuse himself for the lapse of time it is obvious that he should have been particularly careful to give their Lordships accurate information upon the points relating to that petition for review. If he had correctly stated the facts in his petition, although the point to be decided in the appeal was one of general importance, leave to appeal might not and probably would not have been granted. There is, therefore, a material mis-statement in the petition.

Their Lordships have considered whether the mis-statement was intentionally made with a view to deceive this tribunal; and if they had been clearly satisfied that this was the intention of the petitioner, or of those who advised him in India, they would even at this late stage, dismiss the appeal; but they are not fully satisfied that such was the intention; and, although the mis-statement is material, and one that clearly ought not to have occurred, and shows, at least, a great deal of culpable negligence, they are not so satisfied that it was done with the intention to deceive, as to dismiss the appeal at this late period. They desire, however, to say, that they think so seriously of this objection, and it is so necessary to insist that there should be *uberrima fides* on the part of those who come for leave to appeal on special grounds, to Her Majesty, that they must mark their sense of what has occurred by refusing to give to the appellants the costs of the appeal. They desire, further, to say, that if the objection had been made, as it ought to have been by a preliminary motion, they have little doubt that motion would have been successful, and the order for hearing the appeal rescinded. Even if it had been made before the appeal had been entered upon at their Lordships' bar—when it was called on—they must have yielded to it. But considering that the appeal has been heard upon the merits, that Mr. Doyné's observations upon the facts and the law had been concluded, and it was only in the

course of the argument for the respondents that this objection was taken, they think, under all the circumstances of the case, that they ought not now to dismiss the appeal, and that it will be enough to mark their sense of the impropriety of the petition by the refusal of costs.

In their Lordships' opinion, an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason that if the leave to appeal is on that ground rescinded, no further costs are incurred, and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred. In the present case, not only was there no preliminary motion made to rescind the leave to appeal, but the respondent's case, although referring to the facts, did not point to them with distinctness, and there is no reason directed to the objection.

Under these circumstances, their Lordships think that they will best perform their duty, the appeal having been heard, and their Lordships being clearly of opinion that the judgment appealed from is wrong, by reversing that decision, but doing so without costs; and that will be the recommendation they humbly make to Her Majesty.

Appeal allowed

Agent for the appellant; Messrs. *Barrow and Barton*

Agent for the respondent: Messrs. *Watkins and Late*.

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Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Markby, and Mr. Justice Ainslie.

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SYUD EMAM MONTAZOODDEEN MAHOMED (DEFENDANT) v.
RAJCOOMAR DASS (PLAINTIFF).*

HARANCHUNDER GHOSE (ONE OF THE DEFENDANTS) v. DINOBUN-
DHOO BOSE (PLAINTIFF)†

*Act VIII of 1859, ss. 1 & 2—Act XX of 1866, s. 53—Money-decree—
Mortgagee's Lien.*

The taking a money-decree on a specially registered mortgage-bond under s. 53, Act XX of 1866, does not extinguish the mortgagee's lien on the property mortgaged by the bond. There is no substantial difference between the effect of an ordinary money decree on the bond, and a decree on the bond for sale of the mortgaged property; so that the remedy of the mortgagee is the same, so far as the parties to the suit are concerned, whether the decree be made under s. 53, or in a regular suit. A proceeding then under s. 53 is a suit of a civil nature within the meaning of s. 1, Act VIII of 1859, independently of any peculiarities in the special procedure to be adopted. Therefore, where a creditor has resorted to the summary procedure provided by s. 53, and has recovered a portion of his claim in execution of the decree so obtained, a regular suit subsequently brought to enforce his remedies on the bond giving the defendant credit for the amount already recovered is barred by s. 2, Act VIII of 1859. But where the property mortgaged has passed into the hands of third parties, there is nothing in the fact that the mortgagee had obtained a decree on the bond, to prevent him from bringing a separate suit against the transferees.

In the first of these cases the facts were as follows:—

Shodaship Dass, on the 10th of Pous 1273 B.S. (24th December 1866,) lent to the defendant the sum of Rs. 2,000 on a

*Special Appeal, No. 207 of 1874, against a decree of the Officiating Judge of Zilla Backergunge, dated the 13th November 1873, affirming a decree of the 1st Subordinate Judge of that district, dated the 29th September 1872.

† Special Appeal, No. 222 of 1874, against a decree of the Officiating Judge of Zilla Backergunge, dated the 13th of November 1873, modifying a decree of the Sudder Munsif of that district, dated the 28th December 1872;

specially registered bond, whereby the defendant undertook to repay the principal with interest at Rs. 1-8 per cent. per mensem in the month of Chaitra 1273 (March and April 1866), and as collateral security mortgaged certain immoveable property. Shodashib obtained a decree on the bond under s. 53 of Act XX of 1866, and realized the sum of Rs. 800. Shodashib then died appointing the plaintiff Rajcoomar his executor, who, after obtaining a certificate under Act XXVII of 1860, took back the bond on the ground that, under the decree already obtained, he could not get any interest at the stipulated rate after the date of the decree, and could not avail himself of the mortgage of land. Having obtained the bond, he brought the suit to recover the principal, Rs. 2,000, and Rs. 2,010 as interest from the date of the bond to the day of the filing of the plaint. Out of this sum of Rs. 4,010, the plaintiff allowed a deduction of Rs. 713-9 (*viz.*, Rs. 800 realized by him as above, minus Rs. 86-7 for costs of the first proceeding), and prayed for a decree for Rs. 3,278-7 as principal and interest. The defendant stated by way of defence among other things that the plaintiff, after having elected to proceed under s. 53 of Act XX of 1866, and obtained a decree under which he attached the property mortgaged by the bond without any objection on the part of the defendant, was not entitled to sue again on the same bond; that the order for the execution of the decree obtained by the plaintiff was made on the 24th March 1868, and that from that date no steps were taken within one year to keep the decree alive, and that, therefore, the execution of it was barred under s. 22 of Act XIV of 1859, and no suit could be brought to restore it.

The Subordinate Judge held that the plaintiff was entitled to bring this suit, and passed a decree in his favor for Rs. 3,210, deducting Rs. 68-7 in favor of defendant, with interest at Rs. 1-8 per cent. per mensem. The Judge on appeal affirmed the decree, holding that the "summary decree which was barred being out of the way, there was no bar to the present suit."

In the second case the plaintiff obtained a money-decree in 1869, under s. 53 of Act XX of 1866, on a bond specially registered,

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by which certain lands were mortgaged. He brought this suit stating that he had realized only Re. 1 in execution of the decree he had obtained, and prayed that he might have a decree for the unrealized portion of the debt recoverable by the sale of the mortgaged property which had already passed into the hands of one of the defendants who purchased the same from the other defendant, who had bought it at an auction-sale held in execution of a decree obtained by a subsequent mortgagee. The defence was that the plaintiff had no cause of action, the matter in dispute having been decided before ; that the plaintiff had waived his lien on the property mortgaged, and that the defendants in possession being *bona fide* purchasers from the other defendant, the auction-purchaser, were entitled to protection.

The Munsif decided that the plaintiff was not entitled to have a second decree for the same debt as that would be giving him two decrees for the same amount, both being capable of execution, but he considered that the question, whether or not the plaintiff had a lien upon the property mortgaged to him, had not been decided before : he therefore tried that question, and passed a decree in favor of the plaintiff, declaring him entitled to claim a lien upon the property mortgaged by the bond.

Both these cases were heard together on special appeal before Jackson and McDonell, JJ., who referred to a Full Bench the following question :—Whether a creditor who has resorted to the summary procedure provided by s. 53 of Act XX of 1866, and has recovered a portion of his claim in execution of the decree so obtained, is afterwards at liberty to bring a regular suit for the enforcement of his remedies under the bond, merely giving the defendant credit for such amounts as he has already recovered.

The order of reference was as follows :—

JACKSON, J.—These two cases raise what appears to me a very serious question. Although the two cases differ a little in their features, there is one important question which is common to both, and that is whether a creditor who has resorted

to the summary procedure provided by s. 53 of Act XX of 1866, and has recovered a portion of his claim in execution of the decree so obtained, is afterwards at liberty to bring a regular suit for the enforcement of his remedies under the bond, merely giving the defendant credit for such amounts as he has already recovered. There is a case of *Ootshub Narain Chowdhry v. Chittra Recka Goopta* (1), in which a division

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(1) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

OOTSHUB NARRIN CHOWDHRY
AND ANOTHER (PLAINTIFFS) v. CHIT-
TRA RECKA GOOPTA AND AN-
OTHER (DEFENDANTS).*

The 9th January 1872.

*Act VIII of 1859, ss. 2 & 32—Act
XX of 1866, ss. 52, 53, & 55—
Mortgages's Lien.*

A regular suit will lie for a declaration, that property mortgaged by a bond on which a simple money-decree had been obtained by the mortgagee under the provisions of Act XX of 1866 continues liable for the decree, though in the hands of third persons.

Baboo Sreenath Dass and Bhogobutty Churn Ghose for the appellants.

Baboo Girija Sunkur Mozoomdar for the respondents.

The following judgments were delivered:—

KEMP, J.—In this case, the plaintiff has been rejected under s. 32 of Act VIII of 1859. That section enacts that “if, upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of

time, the Court shall reject the plaint.

Provided that the Court may, in any case, allow the plaint to be amended, if it appear proper to do so.” In this case the Subordinate Judge of Furreedpore, Baboo Kali Kinkur Roy, has rejected the plaint on these grounds: His decision is a very short one:—

“To-day this plaint was laid before the Court, and was inspected in the presence of plaintiff’s pleader, Baboo Bishtochurn Roy. Now, when a final decision is passed in execution of a decree by a Court on the evidence adduced by both parties under the authority given to it by s. 55, Act XX of 1866, there does not appear to exist any law or practice for bringing a fresh suit against such decision. As therefore the plaint does not disclose any proper cause of action, it is fit to be rejected under s. 32 of the Code of Civil Procedure. Ordered that this plaint be rejected, the plaintiffs bearing their own costs.”

Against this order an appeal has been preferred on the ground, first, that the lower Court is wrong in holding that the Civil Courts have no jurisdiction in entertaining a suit for the enforcement of a lien on landed property mortgaged under a bond specially registered under the Registration law; and second, that s. 55 of Act XX of 1866 is no bar to the entertainment of the present suit.

* Regular Appeal, No 190 of 1871, from a decree passed by the Subordinate Judge of Furreedpore, dated the 19th May 1871.

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Bench of this Court held in effect that a plaintiff who had obtained such summary decree is not thereby debarred from bringing

There is much in this plaint which might be eliminated, and this, the pleader for the appellants, Baboo Sreenath Dass admits, but substantially the prayer of the plaint is to have the defendants, and more particularly the Goopta defendant, declared liable, and her property liable to sale for the liquidation of the debt secured by the bond of the 9th Jaisti 1274 (22nd May 1867), that is to say, to make the property pledged liable for the debt. The bond was specially registered under the provisions of s. 52, Act XX of 1866. Now s. 52 says, that "whenever the parties to an obligation shall agree that, in the event of the obligation not being duly satisfied, the amount secured thereby may be recovered in a summary way, and shall, at the time of registering the said obligation, apply to the Registering Officer to record the said agreement; the Registering Officer, after making such enquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by ss. 66 and 68, and such record shall be signed by him and by the obligor, and shall be copied into the Register Book No. 1 or No. 6, as the case may be and shall be *prima facie* evidence of the said agreement."

Then s. 53 goes on to say:—"With in one year from the date on which the amount becomes payable, or, where the amount is payable by instalments, within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864, or under this Act, may present a petition to any

Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered." Then there is a provision as to the stamp which is to be used and as to the verification of statements; then it is enacted that:—"On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court. Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

Then s. 55 enacts:—"After decree, the Court may, under special circumstances, set aside the decree, and, if necessary, stay or set aside execution: but there shall be no appeal against any decree or order made under s. 53, s. 54, or this section," that is to say, s. 55.

It appears that the plaintiffs obtained in the first instance a decree on this specially registered bond against both the defendants, Chittna Recka Goopta and Oomakant Mozoomdar. The Goopta defendant prayed for a review of judgment, but her application was rejected; and the plaintiffs executed their decree under the provisions of the latter portion of s. 53. Upon this, the Goopta defendant again appeared as an objector and the Court released her from liability under the decree under the provisions of s. 55. The plaint goes on to say that, in dissatisfaction with the order, the

a further suit. Kemp, J., in his judgment no doubt says in one place:—"It appears to us clear that the plaintiff is

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plaintiffs appealed to the Zilla Judge, and the Judge rejected the appeal, holding that, under the provisions of s. 55, no appeal would lie. The pleader for the appellants, Baboo Sreenath Dass, admits that this was a right decision, and that no appeal lies from an order under s. 55 but the main contention in this case is whether, although under s. 55 the Goopta defendant has been released from liability under the decree, a regular suit will not lie for the purpose for which this suit has been mainly brought, stripping it of all surplusage, namely, to enforce the lien of the plaintiffs under the bond as against the property pledged.

As against the defendant Oomakant Mozoomdar, it is clear that the Subordinate Judge was wrong in rejecting the plaint, because there has been no order with reference to him under s. 55 of Act XX of 1866. The pleader for the respondents is forced to admit that there are no rulings of this Court governing the present case, and that it is a new point; and the rulings quoted by him appear to us [to have no application whatever to this case.

The first is the case of *Jugti Sahoo* (a). In that suit, in which L. S. Jackson, J., was sitting alone, this point did not arise; he was pressed to give an opinion upon it, but distinctly refused to give one. The other case cited was that of *Krishore Ghose v. Brojonath Mozoomdar* (b), present, Peacock, C. J., and L. S. Jackson, J., in which case these learned Judges held, that in applications to the Court under s. 53,

Act XX of 1866, the Court ought not to summon the defendant, the intention of the Act being that the applicant should merely, on production of the obligation and the record duly signed, obtain a decree for the sum mentioned in the petition, or any less sum which may appear to be due with interest and costs, and that it was competent to the Court, under s. 55, on a representation by the judgment-debtor after decree, to set aside the decree, and stay or set aside execution.

Therefore, as admitted by the pleader for the respondents, there are really no decisions of this Court touching on this point.

It appears to us clear that the plaintiff is entitled to institute a regular suit, which he has done, to have the question tried whether the property pledged in this bond is liable for the debt covered by the bond. All that s. 55 enacts is that the Court may, under special circumstances, set aside the decree obtained in a summary way by proceedings under the provisions of Act XX of 1866 and those sections of it which apply to specially registered bonds, and that there shall be no appeal against such orders; but s. 55 does not enact that a party shall not be entitled to bring a regular suit, as the plaintiffs have done in this case, to follow the property pledged to them, and to make the said mortgaged property liable for the debt.

As against the defendant Oomakant Mozoomdar, against whom the plaintiffs have obtained a money-decree

(a) 6 W. R., Mis., 121.

(b) 6 W. R., Civ. Ref., 11.

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entitled to institute a regular suit, which he has done, to have the question tried whether the property pledged in this bond is liable for the debt covered by the bond." If that sentence were taken by itself, it might seem to indicate merely the opinion that the plaintiff, having already got a summary decree for the money lent, would be entitled to have the question tried whether he could not follow the property pledged in the hands of a third party. If that were all that was affirmed by that decision, I do not know that I should be inclined to question it, always supposing that there is some

there can be no doubt that they are entitled to bring a suit to follow and make the property pledged liable for the debt; and as against the other defendant, the female defendant Chittra Recka Goopta, although under s. 55 of Act XX of 1866, she has, under special circumstances, been declared entitled to have the summary decree against her set aside and execution stayed, and although there is no appeal against such an order there is nothing in the law to prevent the plaintiffs from bringing a regular suit to establish the fact that the Goopta defendant and her property are liable under the bond.

In this view of the case, we think that the Subordinate Judge was wrong in refusing to try this case.

We reverse his order, and remand the case for him to try it on the merits. Costs to follow the result.

E. JACKSON, J.—The Subordinate Judge, in this case, has rejected the plaint, under s. 32, Act VIII of 1859, holding that it does not disclose any proper cause of action. I understand that he means by that to refer specially to the words of the plaint which ask the Court to set aside the miscellaneous orders passed under s. 55 of Act XX of 1866, and to have the present defendants

declared liable under the former decree. So far, I think, there may be something in the order of the lower Court rejecting the plaint on the ground that there is no cause of action. There may be no cause of action to set aside these orders, but it does not follow that the plaintiffs cannot now bring a suit to have the defendants and the property pledged declared liable under the bond. It may be a question hereafter how far the former decision may bind the parties, but I am unable to say that, as the case stands, there is no cause of action.

The orders passed under s. 55, Act XX of 1866, have to my mind the effect of altogether setting aside the decree which a person could, under the provisions of s. 53 of that Act, have obtained in a summary way. S. 55 allows the Court which is executing the decree to stay execution, or to set aside execution altogether, but it does not appear to me that the effect of this is to prevent the plaintiffs from seeking their remedy in a regular suit; and although there is no appeal against an order passed under s. 55 there is nothing in the section to say that the plaintiff is precluded from urging his rights in a regular suit.

I, therefore, concur in reversing the order of the lower Court, and remanding the case for trial on its merits.

thing remaining to execute in execution of the decree obtained against the judgment-debtor; but it really appears to me that the judgment of the learned Judge goes further, because he observes:—"Substantially, the prayer of the plaint is to have the defendants, and more particularly the Goopta defendant, declared liable, and her property liable to sale for the liquidation of the debt secured by the bond of the 9th Jaisti 1274 (22nd May 1867), that is to say, to make the property pledged liable for the debt." In that case it appears that certain proceedings had been taken under s. 55, the result of which was to release from liability a person who was called the Goopta defendant. Further on, the learned Judge observes:—"As against the defendant Oomakant Mozoomdar against whom the plaintiffs have obtained a money-decree, there can be no doubt that they are entitled to bring a suit to follow and make the property pledged liable for the debt; and as against the other defendant, the female defendant Chittra Reeka Goopta, although under s. 55 of Act XX of 1866, she has, under special circumstances, been declared entitled to have the summary decree against her set aside and execution stayed, and although there is no appeal against such an order, there is nothing in the law to prevent the plaintiffs from bringing a regular suit to establish the fact that the Goopta defendant and her property are liable under the bond. In this view of the case, we think that the Subordinate Judge was wrong in refusing to try this case." It seems to me therefore that the Division Bench intended to lay down that as against all the defendants, there was a good cause of action upon which the plaintiff was entitled to sue.

Now it appears to me, as at present advised, that the plaintiff finds himself here on the horns of a dilemma. Either he has brought his suit under the summary procedure prescribed by s. 53 upon the bond and has obtained a decree—such a decree as the Court to which he resorted was able to give him—and in that case, the rule of *res judicata* will apply, which rule the Judicial Committee of the Privy Council have repeatedly declared to extend much further than the limited terms of s. 2 of Act VIII of 1859; or else, having to prove under that bond his right to certain relief, including interest

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down to the period of the suit and to the period of realization, together with a lien upon the immovable property pledged in the bond, he has brought his suit only for a part of that which he was entitled to under the bond, and is therefore, by the operation of s. 7 of the Procedure Code, debarred from bringing a further suit in respect of the same matter. It appears to me that this view is not affected by the circumstance that part of the relief to which he was entitled is beyond the power of the Court to which he first went. The plaintiff had his choice of the Courts, and it was open to him to go to the Court which would give him the larger relief. He elected not to do so, and went to the Court of limited jurisdiction. I am inclined, as at present advised, to hold that a plaintiff is not entitled, after having obtained a decree under s. 53 of the late Registration Act, to bring a fresh claim in respect of the same subject-matter in a regular suit. I do not wish to express any final opinion in the matter ; but as the point is one of considerable importance, and is likely to arise again, I think it ought to be referred for an authoritative decision to a Full Bench.

Baboo Kali Mohun Doss for the appellant.—This is a second suit brought on the same cause of action as the first ; therefore it is barred by s. 2 of Act VIII of 1859. The cause of action is already merged in a decree and cannot be litigated again, and there cannot be a second decree against the same party on a cause of action on which there is already a decree against him. The plaintiff had his choice between the summary procedure under s. 53 of Act XX of 1866, and a regular suit under Act VIII of 1859, and he elected the former and obtained a decree. It is not open to him now to proceed a second time by another form of procedure. A defendant cannot be harassed twice for the same cause. With reference to this maxim, their Lordships of the Judicial Committee said in *Soorjomonee Dayee v. Suddanund Mohapatter* (1):—
 “ This law has been laid down by a series of cases in

this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to, *Gregory v. Molesworth* (1), in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of *The Duchess of Kingston*" (2).

In *Ootshub Narain Chowdhry v. Chittra Reeka Goopta* (3), cited by Jackson, J., in his referring order, the plaintiff sought to extend the operation of the decree already obtained, and not to get a fresh decree. In this respect the case is distinguishable from the present one. There cannot be two decrees for the same debt.

Baboo Mohini Mohun Roy for the respondent.—The relief sought in the second suit is not identical with that in the first suit, and depends upon very different considerations: moreover, the parties are not the same. Hence, there is no bar to the second suit. A suit can only be barred by an Act of the Legislature. The difference of procedure in the two cases will show how different the two are in their nature. Under the Code notices must be given, a day must be fixed for the hearing of a cause, issues framed for adjudication, evidence taken upon those issues, and questions of all kinds are decided between parties; but the procedure under the Registration Act is simple and leads at once to a decree for the amount borrowed, without any further formality. A decree therefore in such a proceeding, where no issues can be tried, cannot bar any suit. The Court acting under that Act is a Court of limited jurisdiction. In *Lala Tilakdhari Lall v. Furlong* (4), E. Jackson, J., said:—"There have been several cases before several Division Benches of this Court in which opinions have been delivered

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(1) 3 Atkyn. 326.

(3) *Ante*, p. 411.

(2) 2 Sm. L. C., 6th ed., p. 679

(4) 2 B. L. R., A. C., 230.

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by different Judges of the Court to the effect that a person, who sues upon a bond containing a lien only to obtain a money-decree in the first instance, can afterwards bring a suit to enforce his lien. I concur in those opinions; and following them, the contention of the respondent's vakeel in this case must in my opinion fail." There are cases in which, as here, it is necessary to bring a second suit in order either to complete the plaintiff's right, or to obtain a complete remedy. A mortgagee taking out a money-decree is not bound to bring one suit for the whole of the property belonging to his judgment-debtor, if it has passed to different parties under separate title-deeds—*In re Hurry Mohun Paramanick* (1). *Ootshub Narain Chowdhry v. Chittra Reeka Goopta* (2) is a direct ruling in the respondent's favor.

Baboo Kali Mohun Doss in reply.—The cases of *Lala Tilakdhari Lal v. Furlong* (3) and *In re Hurry Mohun Paramanick* (1)

(1) *Before Mr. Justice Lock and Mr. Justice Mookerjee.*

The 5th May 1871.

IN THE MATTER OF THE PETITION OF
 HURRY MOHUN PARAMANICK.*

Act VIII of 1859, s. 7—*Mortgagee's
 Lien—Limitation—Interest in land
 —Multifariousness.*

Section 7 of Act VIII of 1859 does not bar a suit for a declaration that property in the defendant's possession is subject to the mortgagee's lien, on the ground that such property was part of the property mortgaged, and was not included in a previous suit against other parties for other portions of the property mortgaged.

Mr. Rochfort for the petitioner.

The judgment of the Court was delivered by

Lock, J.—We think that there are

no grounds for admitting this special appeal.

It has been urged before us that the suit has been brought under the provisions of s. 7, Act VIII of 1859.

It appears that the plaintiff in this case has recovered a money-decree against Doorgapersad Chatterjee, who had mortgaged certain property to him. After obtaining this money-decree, he appears to have found out that this property under mortgage was in the hands of another person, named Bepin Behary; and, in 1864, he proceeded against that other person, in order to enforce his lien upon the lands which that person had purchased, and obtained a decree against him,

(2) See *Ante*, p. 411.

(3) 2 B. L. R., A. C., 230.

* Application for admission of special appeal from a decision of the additional Judge of Nuddea, dated the 24th January 1871, affirming a decree of the Subordinate Judge of that district, dated the 29th August 1870.

are distinguishable, inasmuch as the defendants sought to be made liable in the second suit were not the parties against whom the previous suit had been brought.

The following judgments were delivered by the Full Bench :—

COUCH, C.J. (KEMP and AINSLIE, JJ., concurring) (after reading the question referred, continued) :—The referring order points out that this question may have to be considered with reference to both ss. 2 and 7 of Act VIII of 1859, but for the

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and in execution sold the property. He then brought a suit and got a decree against the present defendant, the petitioner before us, who is also purchaser of some of the lands mortgaged to the plaintiff, and it is here now pleaded that the plaintiff was bound, when he brought the former suit against Bepin Behary, to have included the whole of the property as it stood when it was mortgaged to him by Deorgapersad Chatterjee.

We think that though such a suit might have been heard, and not been dismissed for multifariousness, yet the plaintiff, in the course he took in following the property belonging to his debtor upon which he had a lien into the hands first of one purchaser and then of another acted in perfect conformity with law. He was not bound to bring one suit for the whole of that property which was held by different parties under separate title deeds. He had a right first to bring one property to sale, and, if the proceeds of sale were sufficient to meet his debt, further proceedings against the debtor's property in the hands of other parties would be unnecessary; but if the proceeds of that sale were not sufficient to liquidate his debt, he had a right to go against the rest of

the mortgaged property in the hands of other purchasers from the vendor.

We think, therefore, that this objection raised before us against the judgment of the lower Appellate Court is not good.

The second plea raised is as to the point of limitation; and here the petitioner fails to make good his case. He argues that the plaintiff is not entitled to a period of twelve years for preferring his suit, but only to six years.

As this however is a suit for enforcing an interest in land, we do not see why twelve years' limitation should not apply. And we think that the petitioner's counsel is wrong in pleading that the plaintiff's cause of action should commence from the date of the plaintiff's obtaining his decree. The cause of action in this case should be reckoned from the date on which he met with opposition on the part of the person in possession and his bringing the property to sale for the liquidation of the remainder of his debt.

We think it unnecessary to refer to the question of fraud, to which the pleader for the petitioner has referred, as the lower Appellate Court has stated that that plea was given up. We reject the application.

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present it will be convenient to treat it as only involving the question under the first of these sections ; and the first matter for consideration is whether proceedings under s. 53 of the Registration Act of 1866 are to be deemed a suit.

The petition of the person seeking to recover on a specially registered bond duly verified in the manner required by law for the verification of plaints is to be filed in the Court which would have jurisdiction to try a regular suit on the obligation, and that Court is to make a decree, which is to be enforced under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.

The difference between this proceeding and an ordinary suit in which judgment is confessed is that in the first the confession, instead of being directly notified to the Court after a suit has been commenced, is recorded by an officer specially empowered by law to record it in anticipation of any proceedings in Court, and that the Court is specially empowered to act on such confession as soon as it is laid before it.

Special registration was first introduced by Act XVI of 1864 ; the language of s. 52 of that Act differs materially from the language of the later Act, and it may be doubted whether a proceeding, under s. 52 of Act XVI of 1864, could be held to be a suit. Under that section the obligation was to be enforced " without a suit," and there was no provision for making a formal decree—the obligation was to be enforced " as a decree in a suit," but subject to any provisions contained in any law for the time being in force in relation to the enforcement without a suit of bonds or other obligations for the payment of money registered under s. 51. The change of expression must be taken to have been adopted advisedly, and that change supports the opinion that proceedings under s. 53 of Act XX of 1866 are in the nature of a suit. The fact that only certain portions of the Code of Civil Procedure apply to proceedings under the Registration Act—see *Gaur Mohan Das v. Ramrup Mazoomdar* (1)—is not material ; for the substitution of a special procedure up to a decree for the ordinary procedure prescribed in the Code does not alter the nature

of the transaction, which is, as in all ordinary suits, a prayer to a competent Court by a person having a claim against another to enforce that claim by the exercise of the authority of the Court. The claim to the money secured by the bond, and the following up of that claim by application to a Court, is a suit of a civil nature within the meaning of s. 1 of the Code of Civil Procedure,* independently of any peculiarities in the mode of prosecuting it.

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In considering the nature of proceedings under s. 53 of Act XX of 1866, we must look at the nature of the remedy obtainable thereunder, and for this purpose it is necessary to examine the effect of decrees for realization of debts made in ordinary suits. A decree under s. 53 is at least equivalent to a money-decree in an ordinary suit, and an examination it seems to us that there is no substantial difference between the effect of an ordinary money-decree on a mortgage-bond, and a decree on the same bond for recovery of the money due by sale of the mortgaged property. So that whether a decree for the money be made under s. 53, or in a regular suit, the remedy of the mortgagee is the same. When a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property, it becomes vested absolutely in the purchaser.

If the sale be under a decree for sale, it can do no more than this. There is, we think, no warrant for holding that, when a sale is under a decree for sale, it conveys the rights of both creditor and debtor; but that when it is in execution of a simple money-decree only, the rights of the debtor pass and the creditor retains his lien. The object of a sale of mortgaged property in execution of a decree is not to transfer the debt from the debtor to the purchaser of the mortgaged property, but to obtain satisfaction out of the security. Thus, whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the entire interest that he and the mortgagee could jointly sell.

It cannot be rightly contended that the mere taking of a

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money-decree extinguishes the creditor's lien. There is a case of *Sawruth Sing v. Bheenuck Sahoo* (1), which seems to go

(1) *Before Mr. Justice Kemp and
Mr. Justice Glover.*

The 18th December 1869.

SAWRUTH SING AND ANOTHER (DE-
FENDANTS) v. BHEENUCK SAHOO
AND OTHERS (PLAINTIFFS).*

Mortgagee's Lien—Money-Decree.

A mortgagee who obtains a simple money-decree upon a bond by which property is mortgaged to him as a collateral security, does not retain his lien on the property mortgaged after it has passed into the hands of third persons.

Mr. R. T. Allan and Baboo Roop-
nath Banerjee for the appellants.

Baboo Doorga Dass Dutt for the re-
spondents.

THE judgment of the Court was
delivered by

KEMP, J.—These cases were re-
manded by this Court on the 14th
April 1869, with directions to the
Subordinate Judge to decide upon the
bona fides of the deed of sale proffered
by the plaintiff. The reply of the
Subordinate Judge is now before the
Court in the shape of a report under
s. 354 of the Code of Civil Procedure,
and the result of the enquiry by the
Subordinate Judge is that the deed
of sale under which the plaintiff
claims is a *bona fide* transaction. The
second point taken in special appeal is
that the purchaser of the decree which
had been obtained by the mortgagee
Ishuree Singh against Gunesh Sahoo,
still retains a lien over the property
pledged in the mortgage bond.

With regard to this objection, it
may be as well to state shortly the

position of the parties. It appears
that Gunesh Sahoo, on the 3rd of
February 1865, borrowed a certain
sum on a mortgage bond from Ishuree
Singh and Nunkoo Singh; a suit was
brought upon this mortgage bond by
the mortgagees on the 18th of Novem-
ber 1865, who obtained a simple money-
decree, and neither asked for nor
received any decree declaring the
mortgage property liable to be sold
in satisfaction of their bond. The
present defendants bought the share
of Gunesh Sahoo in the family pro-
perty on the 14th September 1867.
Whilst the proceedings in the case of
Ishuree Singh and Nunkoo Singh
were pending, Gunesh Sahoo sold the
disputed property to the plaintiff
Bheenuck on the 31st January 1866.

Now, it appears to us that at the date
of this sale the property of Gunesh
was virtually unburdened; no doubt
there had been upon it originally a
mortgage lien in favor of Ishuree and
Nunkoo Singh; but that lien, if it
were not altogether done away with,
was at all events rendered infructu-
ous by the proceedings of the mort-
gagees in 1865, before the date of the
sale to Bheenuck, when they chose to
waive the right of selling the property
pledged in satisfaction of their mort-
gage bond, and to receive instead a
simple money-decree. It was con-
tended by Mr. Allan for the special
appellant that the purchaser of a
money-decree of this description still
retains the lien, which the original
mortgagee had over the property,
inasmuch as he bought the rights of
these mortgagees, and these mortgagees

* Special Appeal, Nos. 1620, 1621 of 1868, against a decree of the principal
Sudder Ameen of Zilla Sarun, dated the 11th March 1868, affirming a decree of
the Munsif of Purnea, dated the 29th April 1867.

to this length; see the passage beginning "now it appears to us," but these words are qualified by a passage further on, "we do not say," &c.; and the case of *Ramchurn Lal v. Koondun Koomarees* (1) is directly the other way. If then the lien be not

could have brought a suit irrespective of their money-decree to have that decree satisfied out of the property pledged in the bond; and in support of this contention, we have been referred to a decision in the case of *Prahlad Misser v. Udit Narayan Singh* (a). With regard to this precedent, it is enough to say that in that case the decree was obtained upon a mortgage bond, and that it ordered the mortgaged property to be sold in satisfaction of the mortgage debt.

In this case the decree was a simple money-decree, and therefore the precedent quoted is in no way in point. On the contrary, it appears to us that the principle laid down by the Full Bench in the case of *Guptha Singh v. Sheo Sahay Singh* (b) applies to the matter now before us. In that decision it is laid down that a party to whom a property is pledged for a debt, if he contents himself with a simple money-decree against his debtor, cannot execute his decree against the property pledged to the prejudice of a subsequent bond *vide* purchaser. He may enforce his lien by separate action against the party in possession of the property pledged to him; but he cannot execute his money-decree against the property in the hands of the subsequent purchaser. We do not say that such a remedy does not exist to the special appellant in this case, but it is quite clear that, up to this time, he has made no endeavour to follow it, and

has never sued to have it declared that the property was liable to be sold in satisfaction of the mortgage debt. It seems too much to say that a party, who having obtained a money-decree for a mortgage debt, has still the power to sue to have that decree satisfied by declaring that the mortgaged property is liable to sale, can keep that right hanging over his judgment-debtor for an indefinite period of time; and, if he does not choose to exercise that right himself, can sell that right to another a year afterwards. But however this may be, in the present case no attempt has ever been made to pursue such a right, and the point taken by the special appellant's pleader does not therefore arise. It appears to us, therefore, that this special appeal must be dismissed with costs.

(1) *Before Mr. Justice Phear and Mr. Justice E. Jackson.*

The 12th May 1869.

BAMCHURN LALL (PLAINTIFF) v. KOONDUN KOOMAREE AND ANOTHER (DEFENDANTS).*

Mortgagee's Lien—Money-Decree—Kistbandi—Form of Decree.

A kistbandi, or arrangement to pay by instalments the amount of a decree obtained upon a bond, does not effect an extinction of the original debt or the mortgagee's lien upon property mortgaged to him by the bond.

By deed of conditional sale, dated January 1863, the second defendant Rampersad sold certain immoveable property to the plaintiff, who foreclosed in February 1866, and then brought the

(a) 1 B. L. R., A. C., 197.

(b) B. L. R., Sup. Vol., 72.

* Special Appeal, No. 2126 of 1868, against a decree of the Judge of Zilla Bhagalpore, dated the 6th May 1868, affirming a decree of the Subordinate Judge of that district, dated the 14th May 1866.

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extinguished by taking a money-decree, and if it continue an incident of the debt when it passes from a contract-debt into a

present suit for possession. He was opposed by the defendant Koondun Koomaree, who claimed to have a lien on the property by virtue of a mortgage dated the 25th Kartik 1259 (9th November 1852). It appeared that default having been made by Rampersad in payment of her mortgage-debt, Koondun Koomaree instituted a suit, and on the 16th September 1861, obtained a simple money-decree against him, in execution of which the plaintiff alleged that some, if not all, of the mortgaged properties had been sold. However, the decree appeared to have been never fully satisfied, for on the 7th July 1863, a kistbandi was entered into between Koondun Koomaree and Rampersad, whereby the latter in addition to the properties already mortgaged to Koondun Koomaree, pledged certain other properties (also comprised in the plaintiff's deed of conditional sale) as security for the amount of the decree. Koondun Koomaree now claimed a lien for the original debt on all the properties included in the kistbandi. The plaintiff, on the other hand, contended that not only did the kistbandi amount to a satisfaction of Koondun Koomaree's decree of the 16th September 1861, but that it also extinguished the original debt.

The Subordinate Judge held that Koondun Koomaree had a lien on the properties originally mortgaged, but not on those subsequently pledged by the kistbandi.

The Subordinate Judge's decision being affirmed by the Judge on appeal, the plaintiff preferred the present appeal to the High Court.

Baboo *Debendro Narain Bose* and *Kali Kishen Sen* for the appellants,

Baboo *Kali Mohun Doss* for the respondents.

The following judgments were delivered:—

PHAR, J.—I think that both the lower Courts are right in the view they have taken as to the lien of Koondun Koomaree. On the 17th of July 1863 it is certain that this lady had a right of recourse to the property in question for the purpose of realizing her debt. At the same time she had a decree against Rampersad for the same debt which she could satisfy by attachment and sale of any other property belonging to him. On that day she entered into a kistbandi with her judgment-debtor, by which probably she deprived herself of the right of execution of the money decree against Rampersad, viz., in consideration of the other properties pledged by the terms of the kistbandi, she gave up her right to attach and sell in execution of that decree any property of Rampersad which she might be able to lay hold of.

It has been urged that the kistbandi was not only a satisfaction of the decree in the way I have just mentioned, but also effected an extinction of the original debt, and so *ipso facto* did away with Koondun Koomaree's lien.

I do not think this is so. I think her right of recourse to the property pledged by the bond of Kartik 1259 (9th November 1852) was not affected by the decree of September 1861, and was not lost by this lady's giving up her rights under that decree. If this be so, nothing has occurred since July 1863 to affect the lien.

ndgment-debt,—See *Syud Nadir Hossein v. Pearoo Thovil-Jdarinee* (1), (*post*, p. 432 ;) as the creditor cannot sell the

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The foreclosure of February 1865 cannot put the plaintiff in a better position as to this lien than he was in January 1863 when he took the conditional sale, and at that time undoubtedly the property which he bought was subject to Koondun Koomaree's lien and her right to realize her bond debt out of it.

It appears to me, therefore, that this lady's lien still subsists, and the plaintiff has no right to possession except possession subject to that lien. I have been slightly embarrassed by the actual form of the decrees of the lower Courts. It appears to me that they might have been *simpliciter* in the shape of decrees for possession subject to the lien of Koondun Koomaree. But I am told that the form which they have actually taken is due to the circumstance that some, if not all of the property, subject to Koondun Koomaree's lien, has been sold in execution of the decree of 1861, and that consequently that property is no longer in the hands of any of the defendants. However this may be, I think the decree of the lower Court should be modified so as to make it a decree for possession of so much of the land as may be in the possession of the defendants, subject only to the lien of Koondun Koomaree.

Although I think that the decree of the lower Appellate Court should be thus modified, the amendment is not material as between the parties, and I think that the appellant must pay the costs of the respondents in this appeal.

E. JACKSON, J.—I also think that the decree of this Court should pass as just stated by Phear, J. I also think that the lien of Koondun Koomaree on the property subsisted notwithstanding that she had obtained only a money-decree, and notwithstanding that in place of that money-decree she had accepted an instalment bond. In this suit, therefore, in which she has put forward her lien, she is entitled to a declaration of the validity of that lien as against the plaintiff's title to possession. The plaintiff's decree therefore should be for possession of the property subject to this lien.

The respondents will get their costs from the appellant.

(1) *Before Mr. Justice Kemp and Mr. Justice Pontifex.*

The 28th February 1873.

SYUD NADIR HOSSEIN (ONE OF THE
DEFENDANTS) v. PEAROO THOVIL-
DARINEE (PLAINTIFF).*

*Striking Execution off Proceedings—
Money-decree—Mortgagee's Lien—
Assignment of Judgment-debt—Sale
of Property on which there is a Lien
—Act XIV of 1859, s. 20—Act VIII
of 1859, s. 270.*

The striking off of an execution-proceeding affects only the files of the Court and the application for sale, and does not interfere with the continuance of any attachment under the decree which is executed.

* Regular Appeal, No. 240 of 1871, against a decree of a Subordinate Judge of Zill a Dinagapore, dated the 30th June 1871.

1875 property and retain the lien, it must continue in existence so far as may be necessary for the protection of the purchaser. An

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A simple decree for money upon a bond by which immoveable property is mortgaged, carries with it a lien upon the property mortgaged, and that lien continues as an incident to the debt when it passes from a contract-debt into a judgment-debt, and it continues when such judgment-debt is subsequently assigned to a purchaser.

An attachment under a money-decree on a mortgage bond and a mortgage lien cannot co-exist separately in the property hypothecated, and such an attachment must be treated when existing as an attachment for enforcing the lien. And if property subject to such lien is sold in execution of a decree while it is under attachment under the decree upon the mortgage bond, the lien existing upon the property is transferred from the property to the purchase-moneys, and thereupon the property becomes thenceforth discharged from the lien. If after the rejection of a claim preferred by the mortgagee, or person claiming the lien, no regular suit is brought under s. 270 of Act VIII of 1859 to enforce the lien, that lien is lost, and the decree becomes thenceforth a mere money-decree discharged from any incidental lien.

In order to keep a decree alive, s. 20 of Act XIV of 1859 does not require more than than some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt. The proceeding need not be by a person legally and rightfully entitled to the decree.

The *Advocate-General*, offg. (Mr. Paul) (with him Baboo *Bhebanes Churn Dutt*) for the appellant.

Mr. *Woodroffe* (with him Baboos *Sreenath Doss* and *Bhuggobutty Churn Ghose*) for the respondent.

The judgment of the Court was delivered by

PONTIFEX, J.—On the 23th Aghran 1268 (12th December 1861), Mirza

Mahomed Ali Beg borrowed Rs. 8,000 from the Mohunt Ramdasjee; and secured the same by a registered bond of that date, under which 15½ annas share of Pergunna Pultapore in the Collectorate of Maldah was hypothecated. On the 2nd of March 1864, the Mohunt filed a plaint against Mirza Mahomed in the Court of the Principal Sudder Ameen of Moorsshedabad, and therein stated that he instituted the suit for the recovery of Rs. 11,650-14 from the mortgaged property and from other moveable and immoveable properties, as well as from the defendant. Mirza Mahomed, by his answer filed the 6th of April 1864, admitted the amount of the claim, but begged for time. This was refused by the Principal Sudder Ameen of Moorsshedabad, who, by his decree dated the 14th of April 1864, ordered "that the suit be decreed, and that the plaintiff recover from the defendant the amount of the claim with interest."

It has been contended that this decree was a mere money-decree to which the mortgage lien did not and could not attach, inasmuch as the Moorsshedabad Court had no jurisdiction to affect land situate in the Collectorate of Maldah.

On the 4th of May 1864, the Mohunt applied under s. 285 of Act VIII of 1859 for a certificate for executing the decree in the Civil Court of Zilla Dinagore within the jurisdiction of which Maldah was situate. On the 20th of May 1864, a certificate was ordered to be forwarded to the Judge of that zilla, and on the 10th of June 1864, the Mohunt petitioned the Principal Sudder Ameen of Dinagore, stating that he had execut-

order for sale cannot conclude persons not parties to the suit, and without such order, in the absence of any third party interested

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ed the decree, and praying that the amount decreed with costs and interest might be ordered to be realized by sale at auction of the right and interest of the judgment-debtor in the zemindari. Under the proceedings in execution, not only the 15½ annas share of Pergunna Pultapore, but also another property called Pergunna Bansdaub, had been attached and directed to be sold. Mirza Mahomed, on the 9th of September 1864, petitioned that Pergunna Bansdaub should be released from attachment and sale on the ground that he held it as trustee under a *wasiatnama* dated the 1st Baisakh 1266 (13th April 1859). This *wasiatnama* it will be necessary to direct our attention to presently; but in passing, it may be well to notice that it was produced and relied upon as early as the 9th September 1864 as a subsisting instrument of trust under which the judgment-debtor was trustee. On the 13th of September 1864, an order was made on Mirza Mahomed's petition stopping the auction-sale; but on the 13th of December 1864, the Mohunt preferred a petition suggesting that the sale of Bansdaub might stand over, but praying that the sale of the 15½ annas share of Pultapore might be proceeded with; and by an order of the same date, the auction-sale of Pultapore was directed to take place. In this order it is stated that the whole 15½ annas of Pultapore had been attached, and that it was unnecessary to attach it again. The date fixed for sale was the 4th of May 1865. Subsequently to such attachment, the property was attached by Poran Bibee, a judgment-creditor of Mirza Mahomed, under a decree of 1865.

In Falgun 1271 (February, March 1865), the Mohunt had entered into a contract for the sale of the decree of the 14th of April 1864 to Meer Hossein, but the Mohunt refusing to complete, Meer Hossein instituted a suit for specific performance in the Court of the Principal Sudder Ameen of Moorsshedabad, who, on the 23rd of December 1865, confirmed the purchase by Meer Hossein. In the meantime and before such contract had been completed, and during the pendency of the suit for specific performance, the 15½ annas of Pultapore, had been sold on the 29th April 1865 in execution of Poran Bibee's decree, and had been purchased in the name of Korshed Begum, a near relative of Mirza Mahomed, and according to the appellant with the trust funds held under the *wasiatnama*; but according to the respondent with the money of Mirza Mahomed himself.

It would seem that, on the application of the Mohunt or Meer Hossein, it was at first ordered that the sale-moneys should remain under attachment on the ground that the property had been first attached by the Mohunt; but upon application by Poran Bibee to release such attachment on the allegation that the execution case of the Mohunt had been struck off, the sale-moneys were released from attachment. The execution case of the Mohunt had in fact been struck off after the sale under Poran's execution, on the 4th of May 1865, by order of the Principal Sudder Ameen of Dinagore, because the fees of the peon for promulgation of auction-sale had not been paid. But such striking off would only affect the files of the

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in the property, a complete title passes by the sale in execution of the money-decree.

Court and the application for sale, and would not interfere with the continuance of the attachment.

On the 12th June 1865, Meer Hossein applied by petition to the Principal Sudder Ameen of Moorshedabad, stating that the execution case of the Mohunt had been struck off, because during the pendency of the specific performance suit, the Mohunt had been enjoined from carrying it into effect, and asking that the sale-money might be retained until the specific performance suit was disposed of, insisting that the first attachment being under the Mohunt's decree, that decree must have priority and be satisfied out of the sale-money. The Principal Sudder Ameen of Moorshedabad on the same day, after stating that the objection could not be made in that Court, but must be preferred in the Court which made the sale, ordered that the petition should be rejected.

The decree of Poran Bibee had originally been passed in the Moorshe-dabad Court, which also had passed the decree of the Mohunt. The former decree had been sent for execution to the Sudder Ameen of Maldah and the latter to the Principal Sudder Ameen of Dinagore. The sale under Poran's decree had been executed by the Court at Maldah.

On the 30th of June 1865, Meer Hossein presented a petition to the Sudder Ameen of Maldah, stating the result of his petition to the Moorshe-dabad Court, and asking that the sale-moneys which were then in the Maldah Collectorate might be retained, notwithstanding that a cheque for the same had been given to Bibee Poran. The Sudder Ameen of Maldah, on

the 1st of July 1865, held that, in consequence of the execution case having been struck off, the attachment by the Mohunt was annulled, and therefore rejected the petition. Against such rejection Meer Hossein appealed to the Judge of Dinagore, who, on the 9th of December 1865, dismissed the appeal on the ground that he had no jurisdiction, as no appeal could lie. The result was that the sale-moneys were paid out to Poran Bibee. During these proceedings the specific performance suit between Meer Hossein and the Mohunt remained undecided, and it is one of the points to be determined in this appeal, whether these proceedings by Meer Hossein, while only entitled by contract to the decree of the 14th April 1864, were sufficient to keep such decree alive under s. 20, Act XIV of 1859.

The respondents having obtained a decree against Meer Hossein, on the 29th of June 1867, applied for the auction-sale of Meer Hossein's right and interest in the decree obtained by the Mohunt, dated the 14th of April 1864, against Mirza Mahomed. By a sale certificate dated the 1st of February 1869, which recites that the decree of the 14th of April 1864 had been executed by one Bibee Moncerun in Zilla Maldah in No. 173 of 1868 and further recites that the auction applied for by the respondent took place on the 29th of January 1869, it was certified that the respondent herself had become the purchaser of the said decree, and that all Meer Hossein's right and interest therein had passed to her.

It would appear from a petition of the appellant, dated the 21st of July 1868, to the Court at Moorshedabad

If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their

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and from the 5th paragraph of his written statement, that prior to the 2nd of April 1868, Meer Hossein had transferred the decree of the 14th of April 1864 to his mistress, the said Bibee Moneerun, benami with the object of preserving it from decree-holders against himself, and that Bibee Moneerun, with a view to realize the amount due under the transferred decree, had, on the 2nd April 1868, applied to the Court of Moorshedabad for notices to be issued under s. 216 of Act VIII of 1859, and notices having been accordingly issued that the appellant filed his petition of objection thereto.

The appellant in his written statement alleges that Moneerun's application for execution was refused on the 4th of May 1868, but that date is inconsistent with his own petition of objection presented on the 21st July 1868, and also with the petition of Meer Hossein, dated the 3rd of November 1868, to the same Court, in which Meer Hossein stated a sale by deed by him to Bibee Moneerun and that she had executed the decree, and asked that her name might be substituted for his in the execution case.

The final order on this petition does not appear in the printed record; but we have been informed that it was made after the sale certificate to the respondent, *vis.*, on the 3rd of February 1869, and that the application by Meer Hossein was refused on the ground that the transfer to Moneerun was simply benami.

Another question to be determined in this appeal is, whether the proceedings by Moneerun kept the decree of the 14th of April 1864 alive? During

the interval Mirza Mahomed appears to have died. As before mentioned he had been a trustee under the will or *wasiatnama* of 1st Baisakh 1266 (18th April 1859) executed by Kharoonnissa, by which Pergunna Bansdaub and other properties, moveable and immoveable, were so far as the same were made subject thereto, devoted to certain trusts which, if not precisely *wuqf*, were of that nature, and which will was acted upon as valid long before the decree against Mirza Mahomed of the 14th April 1864. It appears that by another *wasiatnama*, dated the 8th Bhadro 1271 (23rd August 1864) Mirza Mahomed, being about to proceed on a pilgrimage for three years, appointed the appellant Nadir Hossein, his sister's son, trustee for three years of Kharoonnissa's will. A recital appears in this document, which has been relied upon, to the effect that the trust income was insufficient to meet the expenses of the trust, and the income is stated as Rs. 3,296.

By his will, dated the 20th May 1868, Mirza Mahomed appointed Nadir Hossein trustee in his place of Kharoonnissa's will; Mirza Mahomed's will recites that 15½ annas share of Pergunna Pultapore had then recently been purchased and formed part of the trust property. Immediately after her purchase of the decree, *vis.*, on the 4th of February 1869, the respondent applied for execution to the Principal Sudder Ameen of Moorshedabad against property in that district and objections to such execution were made separately by Nadir Hossein the trustee, and by the heirs of Mirza Mahomed. The objection of the appellant Nadir Hossein was numbered

1875 absence can prejudice their rights. The decision of the Full Bench in *Gupinath Singh v. Sheo Sahay Singh* (1) is clear on

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43 of 1859, and alleged that he was not the heir of Mirza Mahomed, and that he was not in possession of any property left by Mirza Mahomed, but that he was in possession of trust property under Kharoonnissa's will as trustee in succession to Mirza Mahomed. The order upon this objection, dated 29th May 1869, was that Nadir Hossein should be released from liability under the decree. Such order could only apply to or affect property in the district of Moorshedabad. The objection of Mirza Mahomed's heirs (among whom Nadir Hossein was apparently not included) was numbered No. 23 of 1869, and among other grounds raised the question that execution was barred by limitation. This objection was rejected by the Principal Sudder Ameen of Moorshedabad on the 29th of May 1869, on the ground that the Mohunt's execution case having been struck off on the 4th of May 1865, and Bibee Moneerun having applied for execution on the 2nd of April 1868, she being in fact the nominee of Meer Hossein, such application by her must be considered as sufficient to keep the decree in force.

The respondent subsequently appears to have obtained an attachment of Pargunna Paltapore in the Zilla Court of Dinagore, whereupon Nadir Hossein again under s. 246 made his objection that the property was trust property, and on the 7th of June 1870, the Judge of Dinagore allowed the objection and released Pargunna Paltapore from attachment. In consequence of such release, the respondent instituted the suit in which this appeal arises in the Court of the Subordinate

Judge of Dinagore on the 6th of December 1870, insisting that the original mortgage lien on Paltapore, under the bond of the 28th Aghran 1268 (12th December 1681), was still subsisting, and was incident to the decree of the 14th of April 1864, and must override all alienations by Mirza Mahomed, or persons claiming through him, and praying for a sale of the mortgaged premises in execution of the decree of the 14th of April 1864. As Nadir Hossein in his objections in the Moorshedabad and Dinagore Courts had not raised the question that 15½ annas share of Paltapore had been purchased under Poran's sale in execution out of the profits of the trust property, but had only alleged that such share was trust property, and that he had succeeded to it as trustee under Kharoonnissa's will, the respondent in the plaint could not raise the question of the validity of the purchase under Poran's execution. And as in her plaint the respondent makes no mention of the proceedings in execution by Meer Hossein in 1865, and by Moneerun in 1868, and does not attempt to show that any proceedings in execution had been taken to keep the decree of the 14th of April 1864 alive, between the date thereof and her own purchase of it, she must have assumed that, if she was entitled to the mortgage lien, her right to sue in respect of the mortgaged property would not be barred for twelve years, notwithstanding that the mortgage-debt had been changed into a judgment-debt by the decree of the 14th of April 1864; and this assumption

(1) B. L. R., Sup. Vol. 72.

this point. It seems to us that that decision does no more than declare this as a fundamental rule. The expression "he is

tion would seem to be correct and is in accordance with the judgments of Macpherson, J., in the cases of *Surwan Hossein v. Shâhasadah Golam Mahomed* (a) and *Biswanath Mukhopadhyaya v. Gosaindas Barâ Madak* (b).

The appellant by his written statement in this suit for the first time set out the case that the property had been purchased under Poran's execution out of the profits of Kharoonnissa's trust property. He further insisted that the decree of the 14th of April 1864 was a mere money-decree, which did not carry with it the mortgage lien, and that proceedings in execution under such decree were barred by limitation, inasmuch as Moneerun's application for execution on the 2nd of April 1868 must be treated as fraudulent and inoperative. He also insisted that, as Meer Hossein failed to establish by suit his right to the purchase-money, when the property was sold in 1865 under Poran's execution, and allowed her to obtain such money by submitting to the rejection of his claim under s. 270, his mortgage rights (if any) over the property thereupon ceased.

The Subordinate Judge settled five issues in the suit, which are in effect as follows :—

1. Whether the decree sued upon was barred by limitation?
2. Whether the respondent had a mortgage lien upon the property?
3. Did the property belong to Mahomed Mirsa?
4. Whether the respondent was

bound by the act (default) of Meer Hossein?

5. Whether the respondent was entitled to set aside the alleged trust under which the appellant claimed to hold the property?

On the fifth issue, which in a particular view of the case is a material issue, evidence appears to have been taken, but the Subordinate Judge having decided the case on other grounds did not give any judgment on such issue, though he incidentally expressed an opinion upon it.

The subordinate Judge found on the first issue that the decree was not barred by limitation inasmuch as the proceedings by Meer Hossein in 1865 and by Moneerun 1868 were sufficient to keep it alive. But he seems to have partly founded his decision with respect to Moneerun's proceedings on a decision of the 9th of January 1869, to which he says Nadir Hossein was a party, but which does not appear in the record.

On the second issue, he found that the mortgage lien still subsisted, and had passed to the respondent, and must override any sale under Poran's decree; at the same time incidentally expressing his opinion that the alleged purchase with trust-money was so palpably suspicious that proof of it *bonâ fides* must be adduced before it could be allowed to stand against Mirza Mahomed's judgment-creditors. One ground for such suspicion being the fact that it was purchased in the name of Korshed Begum, a relation of Mirza Mahomed, instead of in th^o

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(a) B. L. R., Sup, Vol., 879.

(b) 3 B. L. R., App.; 140.

1875 simply in the position of an ordinary judgment-creditor in respect of his decree, and can only sell the rights and interests

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name of Nadir Hossein, who was then acting as trustee under his temporary appointment by the deed of the 23rd of August 1864.

On the third issue the Judge found, what is not denied, that the property at the date of the mortgage belonged to Mirza Mahomed. And on the fourth issue he held that Meer Hossein's default in letting Poran get the purchase-money in 1865 did not discharge the mortgage lien.

Against this decision the defendant has appeared, insisting on the same objections substantially as those taken in his written statement.

The issues settled in the Court below are sufficient for the determination of this case.

Taking the second and fourth issues together, I am of opinion that, as the form of mortgage or charge created by the bond of 28th Aghran 1268 (12th December 1861) did not vest any estate in the Mohunt, but only established a lien as incident to the money-debt, such lien continued an incident of the debt when it passed from a contract-debt into a judgment-debt, and so continued when such judgment-debt was subsequently assigned to Meer Hossein. Otherwise the right to the lien must have remained in the Mohunt. But as his judgment-debt represented the full amount for which Mirza Mahomed and the land were liable to him, and as he had transferred such judgment-debt to Meer Hossein for what must be taken to have been its full value, he could not retain the lien either against Mirza Mahomed or Meer Hossein. He could not retain it

against Mirza Mahomed, for he had no longer any debt of demand against him or the lands; and as Mirza Mahomed had neither done nor paid any thing to discharge the lien, it must still have continued to exist. But the only possible existence it could have would be as incidental to the judgment-debt; and therefore I am of opinion that the sale of the money-decree of the 14th of April 1864 passed with it the lien under the bond of the 28th Aghran 1268 (12th December 1861). The cases of *Sarvoen Hosseinv. Shahasadah Golam Mahomed* (a) and *Biswanath Mukhopadhyas v. Gosoindas Madak Bara* (b) are in fact authorities for this position. Such lien could only be enforced against the property subject thereto, so long as it remained the property of Mirza Mahomed, and so long as the decree remained in force by attachment under that decree, though, according to the decisions,—and it would seem as a necessary consequence of s. 246, Act VIII of 1859,—if the property before attachment had passed into the hands of third persons, a separate suit would have been requisite to enforce the lien against the land in the hands of such third persons. It has been urged that, because the property was situate in the district of Maldah, the Moorshedabad Court could have no power to affect it by its decree; but the effect of the decree in the Moorshedabad Court was not to create any right against the land, but to turn a contract-debt to which a lien was incident into a judgment-debt to which without any operation of the

(a) B. L. R., Sup. Vol., 879.

(b) 3 B. L. R., App., 140.

of his debtor," could not be intended to limit the decree-holder's power of selling the rights conferred by his lien.

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Moorshedabad Court, any already existing lien would attach by reason of it representing the original contract-debt.

Moreover in the case before us at the date of the sale to Meer Hossein, the property over which the lien extended had already in fact been attached by the Mohunt under the decree of the 14th April 1864. It seems to me clear that an attachment under a money-decree on a mortgage-bond and the mortgage lien cannot co-exist separately in the property hypothecated; and that such an attachment must be treated when existing as an attachment enforcing the lien. This attachment existing at the date of Meer Hossein's purchase passed as an incident of the decree purchased by him; and as the property was sold on the 29th April 1865 pending such attachment, the lien was transferred from the property to the purchase-moneys; and thereupon the property became thenceforth discharged from the lien. Meer Hossein might, after the rejection by the Sudder Ameen of his application, with respect to these purchase-moneys, have instituted a regular suit to establish his title to them under s. 270; but failing to do so, he forfeited his lien both on the land and the purchase-moneys.

But having forfeited such lien, it does not follow that he forfeited the right to execute otherwise the decree of the 14th of April 1864. The only result was that such decree became thenceforth a mere money-decree discharged from any incidental lien.

It becomes necessary therefore to decide the first issue tried by the Subordinate Judge, viz., Is execution

of that decree barred under s. 20 of Act XIV of 1859?

That section enacts that process of execution shall not issue, unless some proceedings shall have been taken to enforce or keep in force a decree within three years next preceding the application for execution.

It has been strenuously argued before us that the proceeding intended by that section must be a proceeding by some person legally and rightfully entitled to the decree; and consequently that neither the attempts by Meer Hossein in 1865, to obtain the sale-moneys (the decree at that time not having been legally transferred to him), nor the attempt by Moneerun in 1868 to execute the decree (she being a nominee of Meer Hossein for the purpose of defrauding his creditors, and her name not having been substituted for that of Meer Hossein as decree-holder), could operate to keep the decree alive. I cannot find any warrant in s. 20 for such argument. That section appears to me not to require more than that some actual proceeding should be taken which, if successful, would result in the discharge or partial discharge of the judgment-debt. With respect to the proceeding of 1865 by Meer Hossein, if he had succeeded in retaining under attachment, as he was *bona fide* attempting to do, the purchase moneys arising under Poran's execution, the decree, which he had then contracted to purchase, and the transfer of which he was then enforcing by suit in which he afterwards succeeded, might have been satisfied therewith. I see no ground whatever

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Reading these words with the context, they seem to us only to import that the subsequent incumbrancer cannot be concluded

not proceedings to enforce the decree. And with respect to Moneerun's proceedings in 1868, the appellant admits in his written statement that,

on the 2nd of April 1868, she applied for execution, and that notices were issued under s. 216. Had such proceeding resulted in a realization of money, it cannot be said as between the judgment-debtor and Meer Hossein, or those claiming under Meer Hossein, that the receipt by Moneerun of such money would not have gone in discharge of the decree. Moneerun might only have been entitled to hold the money in trust for Meer Hossein, or for his creditor; but that circumstance would not have affected the discharge of the decree in execution of which such moneys were realized. The fraud of Meer Hossein, in attempting to withdraw the decree from the claims of his creditors, did not concern the judgment-debtor. As against him the execution proceedings were very real proceedings, to realize the judgment-debt, and of which, had they been successful, the creditors of Meer Hossein might have availed themselves; and such proceedings were not set aside until after the purchase by the respondent, and only as fraudulent against her. With respect to Moneerun's name not having been substituted for that of Meer Hossein as decree-holder, it does not appear that the assignee need do more than apply for execution under s. 206, Act VIII of 1869, and it does appear from the appellant's written statement, and from his petition dated the 21st July 1868, that in fact Bibee Moneerun had executed the decree, from which execution the appellant by his petition prayed to be released.

I am, therefore, of opinion that the Subordinate Judge was right in holding that execution under the decree of the 14th of April 1864 was not barred. And as a matter of fact that decree has been executed by the respondent in the Moorshehabad Court against the heirs of Mirza Mahomed as an existing decree. But inasmuch as I dissent from the conclusion of the Subordinate Judge, with respect to the continuing existence of the mortgage lien, being of opinion that such lien was upon the sale in execution under Poran's decree transferred from the land to the purchase-moneys, it becomes necessary to enquire whether the property, which the respondent now seeks to sell, is trust property; or whether the purchase in the name of Korahed Begum, under Poran's execution, was in fact a purchase with the money of Mirza Mahomed, and the property purchased consequently liable for Mirza Mahomed's debts.

Having regard to the appellant's defence set up in the second and tenth paragraphs of his written statement, I think that the fifth of the issues settled by the Subordinate Judge was sufficient to raise the question as to whether or not the property was trust property.

This question the Subordinate Judge has only incidentally treated in his judgment, as it was not necessary for him to decide it, if, as he held, the mortgage lien still existed. Some evidence on the issue was adduced by the appellant and appears in the record; and the Judge has clearly shown the inclination of his opinion that the purchase was fictitious, adducing as a reason for such opinion the fact that the property had been pur-

by any order made otherwise than in a suit to which he is a party; but as to whether this is to be brought by the first creditor

chased in the name of a near relation of Mirza Mahomed, and not in the name of Nadir Hossein, the then acting trustee.

In addition to this reason, counsel for the respondent has relied on three circumstances to invalidate the purchase: first, because the trusts of the deed of the 1st of Baisakh 1266 [(18th April 1859) are not *wuqf*, and therefore that the deed is invalid as against the heirs of Kharoonnissa; secondly, that the allegation that the property was purchased out of the profits of Kharoonnissa's trust [property is obviously untrue, because in the deed of the 23rd of August 1864, under which Mirza Mahomed appointed the appellant as a trustee for three years, it is recited that the profits were inadequate to defray the expenses, and the schedule to such deed shows that the income of Rs. 3,296 was fully absorbed in payment of the claims and expenses specified in such schedule; and thirdly, because the property continued after the sale under Poran's decree to be registered in the name of Mirza Mahomed. I think the first of the above grounds untenable, because whether the trusts were or were not strictly *wuqf*, they were trusts that had been established, acted upon, and acquiesced in, for some years anterior to the decree of the 14th of April 1864, at which date all heritable rights (if any) of Mirza Mahomed in the property subject to the deed antagonistic to the trusts thereof, so far as such trusts affected the [property, must be considered to have ceased.

With regard to the third objection, there is nothing in the record to show that, after the sale under Poran's exe-

cution, the property continued to be registered in the name of Mirza Mahomed, but even if the allegation were correct, it would not under any circumstances be conclusive; and in this particular case, if the property was bought with funds of which Mirza Mahomed was trustee, the fact that the property continued registered in his name would be immaterial.

With respect to the second objection, it is no doubt very suspicious that the property was purchased under Poran's execution for Rs. 14,000 on the 29th of April 1865, within less than a year after the recital stating that the trust income was insufficient to defray current expenses; on the other hand, it should be noticed that in Kharoonnissa's will, the profits had been estimated at Rs. 3,636, and that by the death of Mirza Enayet Ali Beg, one of the objects of the trust, Rs. 1,200 per annum, a personal allowance to him, had been set free; and three witnesses were examined on behalf of the appellant, one of whom deposed that Mirza Mahomed purchased the 15½ annas share of Pultapore in the name of Korahed Begum from the funds of Kharoonnissa, but stated that his knowledge was founded only on communication by Mirza Mahomed himself, and another witness stated that the purchase was made by means partly of the trust funds, and partly of a subscription made for the purpose of the purchase. Counsel for the appellant has urged that the respondent has not adduced a scintilla of evidence to show that the purchase-money moved from Mirza Mahomed himself; and he very strongly pressed upon our attention

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or his assignee under the execution-sale, there is nothing said.

The Judgment only deals with the case of a creditor himself

the case of *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (a).

That case is no doubt in many respects a stronger case than the present, and it is there broadly laid down that in cases of this nature, although there may be circumstances of very strong suspicion, though the person insisting on the validity of the purchase may even have given a false account of the sources from which the purchase-moneys were derived, still the affirmation lies upon the party impeaching the sale, and the Court must not act upon suspicion, but must require actual proof that the purchase-moneys are the moneys of the judgment-debtor. Of course, we must follow the rulings in that case, unless the circumstances of the present case materially differ therefrom.

There were two circumstances in that case which were relied on by the Privy Council (p. 48) as very material, which do not exist in the present case. This suit is not "the fruit of angry feeling," and although the plaintiff in this as in that case is only a transferee of the judgment-debt, yet in the present case the property was attempted to be attached by the plaintiff's predecessor, through Moneeran, prior to the transfer to the plaintiff. Under these circumstances, it seems to me very material in the present case to consider what explanation the respondent gives of the manner in which the purchase-moneys were supplied on the purchase in 1865, under Poran's execution, and such explanation deliberately made and supported by evidence, must, I think, be taken as an admission binding upon

him. His statement is that the property was purchased in 1865 out of the surplus profits of Kharoonnissa's trust settlement, and he seems to have assumed that the conclusion of law must be that the property so purchased is trust property. This assumption moreover altogether ignores the fact that the property affected by Kharoonnissa's will was thereby dedicated to trust purposes only so far as the trusts thereby declared might require; and that under such will Mirza Mahomed would, at the date of the purchase, have been entitled to retain for his own benefit all surplus profits not required for the execution of the trusts, inasmuch as, subject to such execution, he was expressly made by that will irresponsible and unaccountable. If then this property was purchased out of surplus income not required for the purposes of the trust, it was purchased with funds which, at the time, Mirza Mahomed might have applied to this own purposes without being liable to account for the same to any one, so that such purchase would in fact have endured for his own benefit; for if the purchase was made out of profits, it follows that before the purchase the trust property was already more than sufficient for the purposes of the trust. No evidence, beyond a mere recital in Mirza Mahomed's will, has been adduced to show that during Mirza Mahomed's lifetime, the property purchased in the name of Korahed Begum by funds applicable to his own purposes was dedicated by him to trust purposes, which would prevent a judgment-creditor executing his decree against the property so

(a) 11 Moore's I. A., 28.

seeking to enforce his lien, and who has not assigned it to another by a sale in execution.

The fact that property is mortgaged to one is no bar to a mortgage or sale of the equity, or right of redemption to another.

The remedy of the mortgagee under a mere money-decree and under a decree for sale being indetical so far as the parties to the suit are concerned, he cannot have a right to a second suit against the same parties to enforce what he has already obtained. Of course, there may be a right of suit remaining against third persons not parties to the first proceeding, but that in no way affects the question before us. The fact that a creditor taking a money-decree has already obtained as complete a remedy against the persons sued as he can have against them, appears to us very strong ground for holding, that proceedings under s. 53 of the Registration Act are as much suits as any other proceedings to which s. 1 and the rest of Act VIII of 1859 apply.

Inasmuch as the creditor who takes a specially registered mortgage bond may be said to have stipulated not only for a summary decree, but also for a right to have specific property sold for satisfaction of his debt if, by a decree made under s. 53 of the Registration Act, he could not get the full benefit of his contract, it might be doubted whether it would be a reasonable construction of the 2nd section of the Procedure Code to hold that he has exhausted his remedy by a proceeding under the first named section, but inasmuch as he does get the full benefit thereof as against the contracting parties, and there is nothing in the fact of his having taken a decree against them under that section to restrain him from proceeding against third persons by a separate suit, there seems to be no ground for holding that the provisions of s. 2 of Act VIII of

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purchased. In the absence of such evidence, and on the admission of the appellant that the property was purchased out of surplus profits not applicable to trust purposes, and as the execution of the respondent's decree is not barred by limitation, I

think that the respondent is entitled to execute her decree against the 15½ annas share of Pergunna Pultapore, and I am therefore of opinion that this appeal should be dismissed with costs.

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1859 do not apply where the first suit is in the form of a proceeding under s. 53 of the Registration Act.

In this view of the case, it is unnecessary to consider the question under s. 7 raised by the referring order.

JACKSON, J. (after stating the facts of both the cases) proceeded :—It will be convenient to deal in the first instance with the suit before the Subordinate Judge. That was on a bond containing an obligation to pay money and a simple mortgage. The nature of the suit to be brought on such an instrument is described in Macpherson on Mortgage (5th edition), p. 10 ; and if the plaintiff succeeds in such a suit, he obtains a decree for the money, with a declaration that he is entitled to have it satisfied by the sale of the land. Such a decree could not be had in a Court of Small Causes, nor could it be made under the 53rd section of the Registration Act.

But the lender had thought fit to protect himself still further by the form of special registration ; and as it appears to be optional in the case of such bonds to proceed under s. 53, or by suit in the ordinary way, he had thus, as it seems to me, secured to him the choice of two remedies or modes of obtaining relief—either the common suit by which he could obtain complete relief, including the enforcement of his mortgage lien, but subject to the necessity of proving his case and to the incidents of appeal and the various delays of regular litigation, or the rapid procedure of s. 53, precluding appeal or even defence, but limited as to the relief afforded. He chose the latter and obtained a decree which completely exhausted his cause of action in so far as that arose out of the non-payment of the money and his right to recover it. And the contract-debt had thus, as it seems to me, merged or passed in *rem judicatam*, so that no further suit for the same debt could be maintained, and both on general principles and by the terms of s. 2 the matter was concluded. I have no doubt that, for the purposes of this discussion, the proceeding under s. 53 was a suit brought in a particular form, and regulated by a particular procedure. And the difference between the plaintiff's position with such a decree, and what it would have been at the con-

clusion of a regular suit is this, that he would have, over and above the judgment for his money, a right created by the deed, but undeclared by the decree, to enforce that judgment by sale of the property mortgaged.

It is not necessary here to state precisely how the difference would affect the decree-holder, it is enough to say that he would be in a distinctly less favorable position as regards third parties. If the land continued in the hands of the debtor, it would probably make no difference at all, for he could always attach the land in execution, and the 11th section of Act XXIII of 1861 would prove abundantly efficacious for the decision of any question which might arise between debtor and creditor: As regards third parties, if the land had been intermediately alienated, it seems to me that the creditor would have a good cause of action against his borrower and the purchasers from that person, upon the separate contract to hold the land at his disposal for the satisfaction of his claim. For these reasons I conceive that the decision of the Subordinate Judge and of the District Judge are both erroneous and ought to be reversed.

In the case before the Munsif, which is the subject of the second special appeal (No. 222), the plaintiff sought a fresh decree for the unsatisfied portion of his claim, as well as a declaration of his lien as against the alienees. Upon the considerations already stated, I am of opinion that the Munsif who granted only the latter prayer was right, and that the Judge who altered his decree was wrong.

MARKBY, J.—I concur in thinking that the proceeding under s. 53 of Act XX of 1866 is a suit which terminates in a decree.

But it is said that, inasmuch as the creditor stipulated not only for a decree but for a right to sell specific property in satisfaction of his debt, it might not be a reasonable construction of the Statute to hold that he has exhausted his remedy by a proceeding under Act XX, s. 53, if under the decree so obtained, he cannot get the same right to sell the property as he could obtain in a regular suit.

I have had some doubt whether this argument sufficiently disposes of the question, what is the cause of action in the

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proceeding under Act XX, s. 53, and wherein does it differ from the cause of action in the suit now before us? But assuming that the difference in the remedy would take the case out of the rule of *res judicata*, still the question arises, could the plaintiff get any remedy in the present regular suit which he could not have got on his decree in the summary suit under Act XX, s. 53?

The plaintiff's rights as decree-holder under s. 53, Act XX, are those of a bond-holder with security who has obtained a simple decree for his debt, or as it is generally called a money-decree. All he could get in the regular suit is a decree against the very same person, namely, his debtor, with the additional declaration, which is now very often inserted in the decree that the property comprised in the bond is to be sold in satisfaction of the debt. The question then is whether there is any difference between these two decrees.

The course of procedure in both cases after decree is precisely the same. The property must be attached and sold by the ordinary process of law in execution of the decree. The thing sold will be the same. A notion has, it is true, been started that only what is (as I consider inaccurately) called the debtor's equity of redemption is sold under a money-decree, that is to say, that the property will be sold subject to the bond-holder's lien. But it is agreed that that is not so, and that the purchaser takes all that the creditor as well as the debtor is able to convey: I may mention that the case of *Erskine & Co. v. Dhun Kishen Sein* (1), which is sometimes relied on as a decision to the contrary, has been reviewed, and an entirely different conclusion arrived at by Loch and Mitter, JJ., who heard the case after the review was admitted.

As regards third persons not parties either to this or the former suit, the result is the same whether the property be sold under a money-decree, or under a decree declaring the lien. Their rights are not affected more or less in the one case than in the other. As against third parties, the declaration of the lien contained in the decree can have no operation what-

soever; they can only be affected by a declaration in a decree in a suit to which they have been made parties. If the rights of claimants to the property subsequent to the security-bond are in any way affected, it cannot be by reason of the declaration made in a suit to which they are no parties, it can only be by reason of the sale. Whether the rights of third parties are in any way affected by the sale or not, is not a matter which, as it appears to me, we are called upon to decide in the present case. There are decisions upon this point—*Sheo Prosun Singh v. Brojoo Sahoo* (1) and *Brajaraj Kisori Dasi v. Mahamed Salem* (2); and I should desire further consideration before holding that in no case the rights of third persons, created subsequent to the security, are in any way affected by a sale under the security-bond, that is to say, so far as it can be said to affect their rights that the whole property pledged should be turned 'into money at the instance of the first pledgee. As a general principle of law, I should be inclined to say that the right to sell the very thing pledged is inherent to the pledgee, and as a general rule I should also say that no claimants upon the property posterior to the first pledgee can interfere with this right, though, of course, they may have a right to redeem before sale; and they may have a very effectual claim on the surplus-proceeds, if there are any left after satisfying the first pledgee. In England the law has been somewhat slower than elsewhere in giving to the pledgee a right of sale, but neither in the English law nor in any other law, as far as I am aware, has there been any doubt that, if the pledgee can sell at all, what he sells is the property pledged: and it appears to me to be very doubtful whether it would not be undesirable both for pledgor and pledgee that there should be a sale of any thing else; because I think such a sale as seems to me to be suggested by three of my learned colleagues might lead to the property being sold at a very inadequate price, as it will be uncertain whether the purchaser is buying the property itself, or a mere right to hold it subject to some claim of third parties.

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(1) 7 W. R., 232.

(2) 1 B. L. R., A. C., 152.

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All, therefore, that I wish to say in this case is that a money-decree against the debtor himself is neither better nor worse than a decree against the debtor himself which declares the lien. If, in order to get the full benefit of his pledge, the bond holder has to sue third parties, there is nothing to prevent his doing so.

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ORIGINAL CIVIL.

Before Mr. Justice Phear.

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BROUGHTON v. W. J. MERCEER AND OTHERS.

Will, Construction of—Charitable Devise—Hospital—Clause prohibiting Alienation.

A testator left his personal property to trustees in trust to pay thereout certain annuities to his son and daughter, and, after bequeathing some pecuniary legacies, devised certain immoveable property to the trustees in perpetuity in trust for the support of hospitals in the North-West Provinces, with directions that the surplus income (if any) from his personalty during the lives of his children, and on the death of either of them, his or her annuity, and on the death of both of them, the whole income of the personalty, should be applied in support of the hospitals. The will also contained a provision that the property should never be sold. In a suit for the construction, and for declaration of the trusts, of the will, it appeared that the income of the personalty was not more than sufficient, after payment of the legacies, to pay the annuities to the testator's children, and that the immoveable property was greatly in need of repairs and did not produce enough for the support of the hospitals, or to enable the trusts of the will relating thereto to be carried out. *Held*, that the devise for the support of the hospitals was a valid devise, and one to which the Court would give effect, as being a charitable trust within the scope of 43 Eliz., c. 4. The Statutes of Mortmain not applying to India, the Court will carry out such a trust when the subject is immoveable property, just as it would if it had been personal property. *Held* also that, if the prohibition against sale were a valid one, the Court could not order a sale merely because it would be advantageous to the charity that the property should be sold: but *held* that the prohibition against sale was void as being repugnant to the devise, and, notwithstanding such prohibition, the trustees had power to sell, or otherwise alienate, the property for the purpose of maintaining the hospitals.

SUIT for the construction, and declaration of the trusts, of the will and codicil of one George Graeme Mercer, described in the plaint as formerly of Futttyghur, North-West Provinces, but late of Aberfeldy in the county of Perth in North Britain.

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The plaint alleged that the testator duly made his will on 7th November 1865, by which, after giving his personal property, consisting of Company's paper amounting to Rs. 60,000, to certain persons whom he appointed his trustees and executors, in trust to pay certain annuities to his son, the defendant W. J. Mercer, and his daughter, another defendant, the testator continued :—

And whereas I have established a hospital in the village of Ghurrie, in the district of Eta, in the North-West Provinces of British India; which I have endowed with a gift of Rs. 5,000 of the 4 per cent. Government loan, which will yield an annual revenue of Rs. 200, and whereas I am desirous of establishing another hospital at Futttyghur in the said North-West Provinces of British India, to be established in my house there situate and known as the "New House," I, therefore direct my trustees to apply the rest of the interest or annual income arising from my said Company's paper, which I estimate will be about Rs. 1,000 a year, to the building of a pukka hospital at Ghurrie aforesaid, which is not to cost more than Rs. 4,000; and upon the same being built, I direct that the said annual sum of Rs. 1,000 be applied thus, Rs. 200, part thereof, to be annually paid for the support of Mercer's Hospital at Ghurrie, and Rs. 800, the remainder thereof, to be paid for the support of the hospital to be established at the "New House" at Futttyghur, and to be called Mercer's Hospital. (Here the testator appointed certain persons to form committees of management for the two hospitals and continued) :—And I give and bequeath to the said Stewart William Gardner and Cuthbert Cooke, and to the survivor of them, and the heirs and assigns of such survivors for ever, my house and premises situate at Futttyghur aforesaid and known as the "New House," together with the land belonging thereto, on trust to permit and suffer the said house, hereditaments and premises to be used as a hospital for the sick of every denomination and creed soever: and I direct upon the death of either of my children taking place, that the annuity hereby bequeathed to him or her shall immediately upon his or her death be applied by the trustees or trustee for the time being of this my will for the support and maintenance of the two hospitals hereinbefore mentioned, and when

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both my said children shall have departed this life, then that the interest arising from the said Company's paper, from which these annuities and the grant of Rs. 1,000 hereinbefore directed to be paid to the said two hospitals, be re-adjusted, and two-thirds of the interest or annual income arising from the said Company's paper be applied by the trustees or trustee for the time being of this my will for the maintenance and support of Mercer's Hospital at Futtyghur, and the remaining one-third for the maintenance and support of Mercer's Hospital at Ghurrie. And as to all the rest and residue of my estate, real and personal, of every nature and kind soever, and wheresoever situate, I give, devise and bequeath the same unto the said Stewart William Gardner and Cuthbert Cooke, and the survivor of them, and the heirs, executors, administrators and assigns of such survivors, upon trust, that is to say, as to the houses, lands, hereditaments and premises, situate at Futtyghur aforesaid and respectively known as "Bunnee Hall," and Deharpara Factory, to demise and let the same, and from the rents to arise therefrom, after paying for repairs and all necessary outgoings, to apply the balance for the maintenance and support of the said two hospitals to be divided equally between them, or to allow the Surgeon or Medical Officer in charge for the time being of Mercer's Hospital at Futtyghur to reside rent-free in the premises known as "Bunnee Hall." And I direct that neither of the said hereditaments or premises be ever sold; and as to the property called Caffre Hall, upon trust to sell and dispose of the same at such price and at such time as my trustees may think fit and to stand possessed of the proceeds arising from such sale, upon trust to invest the same in Government securities, and to apply the interest arising therefrom in the first place to defray the expenses of repairing and upholding the hereditaments and premises hereinbefore mentioned and known as Bunnee Hall and Deharpara Factory, when they or either of them shall be vacant and unlet, that neither of the said premises shall ever at any time fall into disrepair or ruin, and in the next place to apply and dispose of the surplus interest and annual income in the maintenance and support of the said two hospitals.

The plaintiff further stated that by a codicil to his will, dated 21st August 1869, the testator (*inter alia*) directed that his property called Caffre Hall should not be sold, but should be held and applied by his trustees for the same purposes as were declared in the will regarding his other real property in India.

The testator died on 29th October 1869, leaving his son and

daughter him surviving, and the will and codicils were proved by the executors in England; but the Indian executors having renounced probate, letters of administration with the will annexed of the estate of the testator in India were granted to the plaintiff, in accordance with a provision in the will in the event of such a case arising.

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The plaintiff set forth certain correspondence, from which it appeared that the capital of the estate did not produce more than sufficient to satisfy certain legacies and the annuities bequeathed by the testator; that the only property that was at present available for the purposes of the devise to the hospitals was the immoveable property in the N.-W. Provinces; that that property could not be made to produce a sufficient income to carry out the intentions of the testator with regard to the hospitals; and that the property was going to ruin for want of necessary repairs. The testator had bequeathed to his daughter, one of the defendants, an annuity of £ 150 a year only in case she proceeded to Australia within a certain time. The daughter had proceeded to Australia within the time mentioned by the testator, but was now desirous of residing in England.

The plaintiff had presented a petition, praying for the opinion or direction of the Court, on the question whether the daughter was entitled to be paid the annuity wherever she might reside; and for an order that the plaintiff might be at liberty to sell the immoveable estate and apply the proceeds as directed by the will: but the Court declined to make any order of that petition in the absence of the parties interested, and the plaintiff thereupon brought the present suit.

Mr. Phillips for the plaintiff.

The defendants did not appear.

Cur. adv. vult.

PHEAR, J.—In this case questions of some nicety have arisen, and I feel it unfortunate that I have not had the advantage of advice from parties possessing conflicting interests. This Court is asked to construe the trusts of the will of Mercer, and to administer so much of his estate as now remains according to the provisions of that will.

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I have already expressed my opinion that the annuity payable to the daughter is not forfeited by her leaving Australia, and the consequence is that the only property about which there now remains any question is the real property, if I may so call it,—landed property which was devised by the testator to hospitals in the North-West Provinces. Eventually there will be some portion of the personal property set free from other trusts and available for the purposes of the hospitals, but at present, according to the statements of facts in the plaint, there is nothing involved in the gift to the hospitals except immoveable property.

I understand that Mr. Mercer was an Englishman by birth and domicile and the law which affects the disposition of this property must be so much of the English law as is in operation in India.

The first question then that suggests itself is the question whether the devise of immoveable property for such a purpose is a good devise. Now I apprehend that the principal rule of English law which comes into operation with regard to this part of the case, is the rule against perpetuities, which says that all dispositions of real property must take effect, if at all, within the period which is limited by that rule. And beyond that period the taker of property, whether real or personal, cannot *generally* be in any degree controlled in the enjoyment of the property by the will of the original disposer.

In this case, the devise has taken effect amply within the period so limited; but can the application of the property be still longer controlled according to the wishes of the testator? Can the taker be compelled to carry the trusts of the will into effect? Although in England this cannot generally be done, yet when the purpose for which property is given falls within the scope of 43 Eliz., c. 4, the Court of Chancery has authority to establish the trust and to take all requisite measures, as by appointing trustees and framing a scheme, and so on, when necessary to give effect to the trust, subject however to the qualification, that if the trust is such as to possess the character of a superstitious use, the gift is void and cannot have effect given to it, and subject also to the further large quali-

fication that *devises* of real property to such charitable uses as are not privileged, or excepted by Statutes, are void. I need hardly say, that the Statutes which deal with and are applicable to these devises are commonly, though not very correctly, called the Statutes of Mortmain.

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The particular charitable purpose to which the property has been devised in this case is a hospital, and it has been decided in England that a hospital comes within the scope of 43 Eliz., c. 4—*Attorney-General v. Kell* (1) and *University of London v. Yarrow* (2)—the latter a somewhat remarkable case, inasmuch as it was there held that a hospital for the cure of domestic animals was within the scope of the Statute. So that the charitable purpose to which the testator has devoted his property is one to which the Court of Chancery in England would take care that it was devoted in perpetuity notwithstanding the ordinary rule against perpetuities; and the High Court as successor of the Supreme Court inherits the powers of the Court of Chancery in this respect, if these powers are to be attributed to the forum rather than to Common Law. Probably, however, it would be right to say that the Statute of Elizabeth is declaratory of the Common Law, and does not merely endow the Court of Chancery with special powers. But, however this may be, both this Court and the late Supreme Court have, in very many cases, acted under the authority of the Statute of Elizabeth and given effect to charitable trusts in the nature of perpetuities within its scope.

It is hardly necessary for me to add that the Mortmain Acts are not operative in India: for that has been laid down authoritatively in more than one case—*The Mayor of Lyons v. The East India Company* (3), *Attorney-General v. Stewart* (4), and *Mitford v. Reynolds* (5). This being so, it must follow that this Court will carry out a trust of this kind when the subject is immoveable property just as it would if it had been merely personal property. It, therefore, seems to me, that the devise

(1) 2 Beav., 575.

(4) 2 Merivale, 143.

(2) 3 Jur., N. S., 421.

(5) 1 Phil., 185, p. 192.

(3) 1 Moore's, I. A., 175.

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of this property to the hospital is good, and ought to have effect given to it.

The next question, and the all-important one in this case, is, whether any portion of the property can be sold; for, if it cannot, and if I understand the facts aright, then it is almost valueless to the charities in their present state. It does not and cannot be made to produce income, and the hospital buildings are falling into ruin for want of repairs. The testator has, however, expressly forbidden that the property or any portion of it should be sold, and if this condition thus imposed is valid and operative, I think the Courts cannot order a sale merely because it would be advantageous to the charity that the property should be sold. A Court of Equity will no doubt in all cases brought before it oblige an owner, who is of full age, to sell or to do all that he ought to do with regard to property in order to discharge his liabilities to other parties in respect of it; and under similar circumstances the Court will order a sale to be made on behalf of a minor which shall be binding on him when he comes of age: but it has been expressly laid down, that the Court has no authority to order a sale merely because it would be beneficial to the owners—*Calvert v. Godfrey* (1), and also that the Court could not sanction a sale by trustees for the benefit of the minors before the occasion for the existence of the power of sale had arisen—*Johnstone v. Baber* (2). If then the trustees in the present instance have no power to sell, that is are in the same position as that of trustees whose power has not arisen, this Court cannot sanction a sale merely because it would be beneficial to the charity.

But in my opinion, after the best consideration I can give to the matter, the prohibition of the testator against selling is void. It is, I may say, repugnant to the gift. It is an endeavour on the part of the testator to limit the incidents of the property beyond the period authorized by the rule against perpetuities to a greater extent than is needed for the charitable purpose to which he has devoted the property. I may almost venture to say that the only restraint which the testator could have imposed with regard to dealing with the property was the

(1) 6 Beav., 97.

(2) 8 Beav., 233.

restraint involved in the purposes to which it is devoted. To use English technical language the fee went for that purpose, and it is repugnant to that estate that the holder of it should be forbidden to sell. And I may add that there is nothing intrinsic to a charitable purpose, certainly not to one of this kind to prevent property from being sold on behalf of the charity, if there is any necessity for the sale. In the case of *The College of St. Mary Magdalen, Oxford, v. Attorney-General* (1), the Lord Chancellor said: "There is no positive law which prohibits the sale of charitable lands." So I apprehend that the founder of a charity like this cannot forbid a sale when absolutely necessary for the purposes of the charity to which he devotes his property, though he might, no doubt, if he thought fit, have given the trustees a larger discretion with respect to selling than would be involved in the purposes and needs of the charity itself. It seems to me then, on the whole, that the property has been given by the testator for a specific charitable purpose, and that the trustees have all the powers of an owner over it which are necessary to make it effective for the purpose. The principles which were lately laid down by the Privy Council as to *debutter* property in the case of *Prosunno, Kumari Debya v. Golab Chand Baboo* (2) seem to apply very aptly here. The words of the judgment are:—"But notwithstanding that property devoted to religious purposes is as a rule inalienable, it is, in their Lordships' opinion, competent for the sebit of property dedicated to the worship of an idol, in the capacity as sebit and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power however to receive such debts must be measured by the existing necessity for incurring them. . . . It is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must in the nature of things be entrusted to some person as sebit or manager. It

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(1) 3 Jur., N. S., 675.

(2) *Post*, pp. 458, 459.

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would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them." •

If "charitable" be read for "religious" and "hospital" be put for "idol," these passages become exactly in point, and the ground of the reasoning would seem to be the same in both cases.

On the whole then, I am prepared to declare that the devise of this immoveable property to the purpose of the hospitals is valid and ought to be carried into effect : and also that the trustees have authority on the state of facts given in the plaint to sell so much of this property as may be needed for the repairs of the hospital. With these views I think I must declare that the trustees under this will have power to sell or mortgage the immoveable property devoted to the hospital, to such an extent as may be necessary for keeping the hospital in efficient operation.

Attorneys for the plaintiffs : Messrs. *Berners, Sanderson and Upton.*

PRIVY COUNCIL.

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POSUNNO KUMARI DEBYA AND ANOTHER (PLAINTIFFS) v. GOLAB
CHAND BABOO (DEPENDANT).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Debutter Property—Sebait—Power of Alienation—Res Judicata.

As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable.

It is competent, however, for the sebait in charge of property dedicated to the worship of an idol, in his capacity of sebait and as manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power to incur such debts is to be measured by the existing necessity for incurring

* *Present* :—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,
AND SIR ROBERT P. COLLIER.

them, the authority of the sebaït being in this respect analogous to that of a manager for an infant heir.

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It being competent for a sebaït to borrow money for necessary purposes, it follows that judgments obtained against a former sebaït in respect of debts so incurred, are binding upon succeeding sebaïts, who form a continuing representation of the *debutter* property.

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• But, before applying the principle of *res judicata* to such judgments, the Court should be satisfied, that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried, and decided in the suits which led to them.

Execution of such judgments should be decreed only against the rents and profits of the *debutter* property.

APPEAL from a decision of the Calcutta High Court (Markby and Birch, JJ.), dated 22nd May 1873.

The main question to be determined on this appeal was the validity and effect as against the appellants, who are the sebaïts of the idol Lukshmi Narain Thakoor, of certain decrees obtained against their predecessor in the sebaïtship, Raja Baboo, by the respondent Golab Chand Baboo.

The suit was brought to have these decrees set aside, and the property of the idol, which, at the instance of the defendant, had been attached in execution of the decrees, released.

The plaintiffs had a judgment in their favor in the Court of the Subordinate Judge of Zilla Dacca, but on appeal by the defendant to the High Court, that decision was reversed, and from the judgment of the High Court, the plaintiffs appealed to Her Majesty in Council.

The material facts of the case and the issues raised are fully set forth in the report of the case in the Court below (1).

Mr. Cowie, Q.C., and Mr. Romer for the appellants.

Mr. Leith Q.C., and Mr. Doynes for the respondent.

Mr. Cowie submitted that there was ground shown for setting aside the decrees as having been obtained fraudulently and collusively. He would not, however, rely on that contention. Assuming the decrees not to have been brought about by collusion and fraud, still they were not binding on the appellants.

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The powers of a sebit do not make it competent for him to charge the estate of the idol, or at any rate, not beyond the term of his own incumbency—*Radha Bullubh Chand v. Juggut Chunder Chowdhry* (1). The cases of *Kissonund Ashrom Dundy v. Nursing Doss Byragee* (2) and *Juggut Chunder Sein v. Kishwanund* (3) were referred to by the Judges of the High Court, who said that no attempt had been made to distinguish them from the present case. They were, however, distinguishable. In the first the question was as to a right of property. A suit was brought by a third party to recover land from which he had been ejected by a sebit, who claimed it as the property of the idol. It was decided that the sebit had no right to the land. It was held in subsequent proceedings, and rightly, that such a decision binds the idol, and consequently, the sebit's successors. In the second case there was no dispute as to the validity of the encumbrance. The sole question was whether the claim had been paid off. The case of *Maharane Shibes-souree Debia v. Mothooranath Acharjo* (4), which was also referred to by the Judges of the High Court, was likewise distinguishable as binding the property of the idol. The case went to show that the sebit's powers in respect to lands dedicated to religious uses are strictly limited.

The intention of the Courts which passed the decrees now in question was to bind Raja Baboo personally, and not as sebit of the idol. Consequently, the decrees were not operative as legal decisions as against succeeding sebits. Apart from the construction of the terms of the decrees, they are not binding on the appellants. The sebit is in the position of a trustee, who is not bound by the irregularities of his predecessor. There was no clear finding that the debts for which the decrees were given were properly incurred, or that the sums borrowed had been applied for the benefit of the idol.

Mr. Romer on the same side.—The decrees are not against the appellants. They do not decide that there could be a charge

(1) 4 Sel Rep., 151.

(2) Marsh., 485.

(3) 2 Sel. Rep., 126.

(4) 13 Moore's I. A., 270.

on the estate of the idol. They are decrees against the private property of the former sebit. If they are analysed, they are in favor of the appellants. [Sir BARNES PEACOCK.—You sue to set aside these judgments and decrees ; but, if they do not prejudice you, there is no need to ask that they be set aside. If they only warrant seizure of the profits of the *debuttur* lands during the former sebit's holding, you have no occasion to set them aside.]

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Mr. *Leith*, Q.C., for the respondent.—The liability of the *debutter* lands was judicially determined in the suits in which the decrees now sought to be set aside were made. Under a. 2, Act VIII of 1859, the same question cannot be again tried between the same parties. The appellants having failed to show that these decrees were collusive and fraudulent, have been obliged to abandon that part of their case. They now contend, first, that on a just construction of the decrees they were *ex facie* intended to bind Raja Baboo alone ; secondly, that if intended to bind succeeding sebits, they are invalid.

On the first point, from the language of the decrees, it was clearly the intention of the Courts that the amount decreed should be realized from the profits of the *debutter* lands, and there are no words to restrict realization to the period of Raja Baboo's incumbency.

As to the second point ; if a succeeding sebit were not bound by a decree obtained against his predecessor, there would be a wide opening for fraud, since the incumbent against whom the decree had gone might easily pass the endowment colorably into other hands, as had been done here, the appellants being the wife and nephew of the former sebit. The right of the sebit to charge the idol's estate might rest on special, or on general, grounds. In the present case, there was evidence that the original grant was made to Bhiken Lall, the grandfather of Raja Baboo, as a reward for services rendered ; but, that in order to exempt the lands from public burthens, they were colorably conveyed for religious and charitable uses. In this particular case, it might be taken that the sebit was intended to have full powers to charge the estate. But generally, and

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irrespective of the terms of the foundation, it was clear that sebaits are privy in estate in such a sense that, where an issue involving a charge on the estate of the idol has been properly and regularly determined by a Court of law against a former sebaith, the decision binds his successor. The cases of *Kissq-mund Ashrom Dundy v. Nursingh Doss Byrages* (1) and *Juggut Ohunder Sein v. Kishwanund* (2), which were referred to in the judgment of the High Court, were decisive to that effect. The distinction which Mr. Cowie attempted to draw between these two cases and the present, had no real foundation. In all three cases, the property of the idol had been the subject of suit, and had been held liable. The case of *Maharange Shibessouree Debia v. Mothooranath Achario* (3) was entirely in the respondent's favor. Had it been shown that the decrees were fraudulently obtained, there would have been ground for setting them aside. In *Lalla Bunseedhur v. Koonwar Bindessuree Dutt Singh* (4), the decision, as appears from Lord Chelmsford's remarks (5), went entirely on the evidence that the transaction was tainted with fraud.

The position of the sebaith is not like that of a trustee. He is clothed with fuller powers. His position more nearly resembles that of the manager for an infant heir, who may charge the heir's estate in case of need, and for the benefit of the estate—*Hunoomanpersaud Panday v. Mussamut Babooee Munraj Koonwaree* (6). It is essential for the purposes of the endowment that the sebaith should have power to borrow money. The Courts, in making these decrees, decided that the money borrowed was borrowed for the purposes of the endowment; the liability of the *debutter* lands was consequently not limited to the incumbency of the borrower.

Mr. Cowie in reply.—Mr. Leith puts his case on special and on general grounds. As to the first, he says we are dealing with property devoted to religious and charitable purposes, but *sub modo*, under the terms and conditions of the sanad by

(1) Marsh., 485.

(2) 2 Sel. Rep., 126.

(3) 13 Moore's L. A., 270.

(4) 10 Moore's L. A., 454.

(5) *Id.*, 460.

(6) 6 Moore's L. A., 393.

which the endowment was created I find nothing in that sanad to extend the powers of the sebaity beyond the expressed religious and charitable objects. The lower Courts have not decided that there is any residuary beneficial interest in the sebaity. As to the general grounds, Mr. Leith says that, irrespective of the terms of the foundation, the law will imply a power to borrow. But the case which he cited of a guardian charging the estate of an infant heir, was a case of money borrowed for necessary purposes. There is no finding in the present case that there was any necessity to borrow.

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The judgment of their LORDSHIPS was delivered by

Sir M. E. SMITH,—The appellants sued in the Court of the Judge of Zilla Dacca as sebaits of an idol called Lukshmi Narain Thakoor to set aside two decrees dated respectively the 27th February 1822 and the 25th July 1854, obtained by the respondent against their immediate predecessor, the sebaity Raja Baboo, and to have the *debuttur* property of the idol released from the attachment issued in execution of these decrees.

It was alleged in the plaint that the above decrees were obtained by fraud and collusion, and an issue was framed on this charge. The Zilla Judge gave a judgment on this issue, from which, although somewhat ambiguous and obscure, it may be inferred that he considered the charge of fraud had been sustained. The High Court, however, on appeal, came to the distinct conclusion, and in their Lordships' opinion rightly, that this charge was unsupported by any evidence. The learned counsel for the appellants having admitted at the Bar that he could not on this point successfully impeach the judgment of the High Court, it is unnecessary to consider it further.

It should be observed *in limine* that the case does not come before their Lordships by way of appeal from the decrees sought to be impeached, but upon a fresh suit to set them aside.

The facts which led to the suit in which the first of the two decrees was obtained are found in the judgment of the Judge of the Civil Court of Dacca. It appears that Raja Baboo, who was a man of profligate habits, having spent the income of

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the *debuttur* property on his own pleasures, borrowed Rs. 4,000 from the respondent to defray the expenses of the worship of the idol, and of repairing the temple. As security for this advance he gave a bond to the respondent, and also a *rahannama*, by which he pledged the *debuttur* property for the repayment of the borrowed money. In both securities it is stated that the money was borrowed for the service of the idol and the expenses of the temple. The respondent brought his suit against the sebit Raja Baboo on these documents, and issues were raised and evidence gone into upon the question of fact, whether the money was *bona fide* borrowed and expended for the service of the idol, and also upon the questions of law whether Raja Baboo could pledge the *debuttur* property for money so borrowed and expended, and whether the profits of it could be attached for payment of such a debt. It appears that the Principal Sudder Ameen gave the respondent a decree for the debt and interest, but ordered the amount "to be realized from such private property of Raja Baboo as is not prevented from being sold by auction," intimating that the question whether the *debuttur* property could be so sold might be determined at the time of the execution of the decree. The present respondent appealed from this decision of the Zilla Judge. In disposing of the issue of facts, this Judge came to the conclusion that the money had been borrowed and expended for the service of the idol. On the other questions he held, first, in conformity with the opinion of the pundit of the Court that the *rahannama* or specific pledge of the property could not be enforced; but secondly, that a decree founded on the bond for the money so borrowed might be given, to be realized from the rents of the *debuttur* lands. He accordingly so framed the decree.

The second decree now sought to be set aside was obtained in a suit instituted by the respondent in the Court of the Principal Sudder Ameen of Dacca against Raja Baboo on a bond for Rs. 2,700, gave by him for money which the bond states was borrowed for the service of the idol, part of it being to defray the necessary expenses of a law-suit affecting the *debuttur* lands. Issues were framed as in the former suit, with respect to the purpose for which the money was borrowed, and the liability of

the *debutter* property to be attached for the debt. These issues the Principal Sudder Ameen found in favor of the respondent, and decided that the debt should be paid by Raja Baboo, or else realized from the profits of the *debutter* mehal.

The above two decrees are entitled to the force due to judgments of competent Courts. The determination of the issues is *res judicata*, and their Lordships think that, in the absence of proof of fraud and collusion, the High Court was right in holding that it could not reopen and review the judgments founded upon them. Nor need their Lordships now say whether the Judge in the first case was right in holding upon the evidence of title before him that Raja Baboo had no power to make a specific pledge of the *debutter* property, since they are not sitting in appeal to determine whether his conclusions of fact or of law are right or wrong. They can now properly deal only with the operation and effect of the decrees as they stand.

The question, however, how far these judgments are binding upon the appellants, the successors of Raja Baboo, remains, and has been argued at the Bar.

It was first contended that, according to the true construction of the decrees, they were *ex facie* intended to bind Raja Baboo alone, and not succeeding sebaits; but their Lordships, during the arguments, stated that in their opinion the plain meaning of the decrees was that the entire debts should be realized out of the profits of the *debutter* lands.

The main point for decision remains, whether these decrees can now be legally carried into effect, which raises the question whether the profits of *debutter* lands can be attached and appropriated during the incumbency of succeeding sebaits by virtue of judgments obtained against a former sebit in respect of debts properly and necessarily incurred by him for the service and benefit of the idol.

It is to be observed that the question is not raised whether the lands themselves could be sold under the decrees.

There is no doubt that, as a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable.

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In an appeal, which not long ago came before this tribunal, a question arose as to the validity of a grant of a maurasi potta at an invariable rent of *debuttur* lands. Lord Chelmsford, in delivering the judgment, said :—" The talook itself, with which these jamas were connected by tenure, was dedicated to the religious service of the idol. The rents constituted, therefore, in legal contemplation, its property. The sebait had not the legal property but only the title of manager of a religious endowment. In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage." And this Committee having regard to the presumption arising from this state of things, and other facts appearing in the evidence, held that the potta was not, in fact, established—*Maharanee Shibessoures Debia v. Mothooranath Acharjo* (1).

But it is to be observed that this Committee, whilst considering that the grant of such a potta by a sebait would be *prima facie* a breach of trust, expressed an opinion that, if the grant had been affirmed by a judgment, the succeeding sebait would have been bound by it ; probably for the reason that after a judgment it must be assumed either that such a potta was warranted by the terms of the original endowment, or by usage, or was in some way beneficial to the interests of the trust. It is said :—" If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings and specially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them."

But, notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships opinion, competent for the sebait of the property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity

for incurring them. The authority of the sebit of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice Knight Bruce:—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party he cannot take advantage of his own wrong to support a charge in his own favor against the heir grounded on a necessity which his own wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malá fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt"—*Hunoomanpersaud Panday v. Mussamut Babooe Munraj Koonweres* (1).

It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as sebit, or manager. It would seem to follow that the person so intrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.

Assuming, then, that a sebit may incur debts or borrow money for necessary purposes, in the sense above explained, it appears to be right and reasonable that judgments obtained

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(1) 6 Moore's I. A., 393, at p. 423.

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against a former sebit respect of debts so incurred should be binding upon succeeding sebits, who, in fact, form a continuing representation of the idol's property. If such debts, and the judgments founded on them, were not held to be thus binding on successors, the consequence would be that no sebit would be able to obtain assistance in times of need; for, on an opposite state of the law, he might defeat the creditors who had afforded it, by at once transferring the property to other sebits, as was actually done in the present case by Raja Baboo, who, after the decrees were obtained against him, appointed the appellants, his wife and nephew, sebits in his place.

The above view is consistent with what appears to have been the opinion of this Committee in the passage already cited in the case of *Maharane Shibessouree Debia v. Mothooranath Acharjo* (1) and with two decisions in India—*Juggut Chunder Sen v. Kishwanund* (2) and *Kissonund Ashrom Dundy v. Nursingh Doss Byrages* (3).

Before, however, applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them. These conditions appear to have been fulfilled in the present case.

It is to be observed that execution of the judgments sought to be set aside is decreed, and in their Lordships' view rightly, only against the rents and profits of the *debuttur* lands. Whether the judgments have been satisfied by the profits already received, or whether some provision ought to be made out of such profits, during the pendency of the attachments for the continuance of the worship of the idol, are questions not raised in this appeal. The object of the present suit is to have the properties released from attachment on the ground that the decrees were obtained by fraud, and were in no way binding on the succeeding sebits. In deciding against this claim,

(1) 13 Moore's I. A., 270.

(2) 2 Sel. Rep., 126.

(3) Marsh., 485.

their Lordships do not desire to prejudice the determination of the questions above adverted to, if they should be hereafter raised. 1875

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

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Appeal dismissed.

Agents for the appellants: Messrs. J. S. and A. P. Judge.

Agent for the respondent: Mr. D. E. Forbes.

APPENDIX.

APPENDIX.

Before Mr. Justice Phear and Mr. Justice Morris.

THE QUEEN v. MUSSAMUT ITWARYA.*

1874
July 3.

Criminal Procedure Code (Act X of 1872), s. 263—Verdict of a Jury when to be set aside.

In accordance with the order of the High Court dated 9th May 1874 (see ante, p. 54), the prisoner was again put on her trial on a charge, under s. 307 of the Penal Code, of an attempt to murder the girl Ramkoori by pushing her into a well. The matter came on the 6th June 1874, and the jury returned a unanimous verdict of acquittal. The Judge, however, disagreed with that verdict, and referred the case to the High Court under s. 263. In his reference, the Judge stated that "they (the jury) have explained their verdict by saying that they found her (the prisoner) not guilty, because there was no eye-witness to the fact, and because the evidence was contradictory. As I think the evidence of the witness Ramkoori is trustworthy and clearly proves the offence with which accused is charged, that there is also corroborative evidence to certain extent, and that no reasonable motive has been shown for attributing the charge to falsehood or mistake, I have dissented from the verdict, and think the case should be submitted to the High Court."

Mr. Collis (Baboo Kally Kishen Sen with him) for the prisoner.—Upon the Judge's own showing, this is not a case for the interference of the High Court, as it appears the evidence was contradictory; the jury are the judges of the inferences to be drawn from the evidence, and they have refused to infer the guilt of the prisoner from it. The High Court will only interfere when the jury are undoubtedly wrong—*The Queen v. Sham Bagdi* (1). The powers given to this Court under s. 263 are not to be lightly exercised, and the unanimous verdict of a jury ought not be set aside, even if the Sessions Judge disagrees with it unless the verdict is patently wrong and unsustainable—*The Queen v. Nobin Chunder Bannerjee* (2); see also *The Queen v. Hurro Manji* (3).

Again, Ramkoori's statement that she saw the prisoner throw her in is simply an inference, because she says the prisoner was behind her, and she was pushed in from behind.

* Criminal Reference by the Officiating Sessions Judge of Patna dated the 8th June 1874.

(1) 13 B. L. R., App., 19. (2) 13 B. L. R., App., 29. (3) *Post*, p. 2.

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The Judgment of the Court was delivered by

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PHEAR, J.—We think that we ought not to interfere with the verdict of the jury in this case.

The principle which should govern this Court in reference of this kind was first explained in the case of *The Queen v. Nobin Chunder Bannerjee* (1), and was afterwards expressly adopted by another Bench of this Court in the case of *The Queen v. Hurro Manji* (2). And we understand that it has been generally cited upon ever since.

Now, in the present case there is no evidence upon which a conviction could be sufficiently based unless it be the evidence of the child Ramkoori. And she does not pretend to say that she saw the prisoner push her into the well. When she states that the prisoner was the person who pushed her into the well she plainly makes that statement as an inference of fact because she goes on to describe that she was pushed in by some one from behind and the last time that she had actually seen the prisoner, according to her own story, the prisoner was at some distance from her in the house. The first reason, therefore, which the jury give for their verdict is strictly applicable,—namely, that there were no eye-witnesses of the principal fact.

In the absence of direct evidence that the prisoner did in fact push the child into the well no doubt it was competent to the jury nevertheless to come to that conclusion from circumstantial evidence that the prisoner did do so. But the jury have refused to come to that conclusion upon the circumstantial evidence. And unquestionably, it is possible taking the facts of the occurrence to be precisely those which Ramkoori herself describes that she may have been mistaken when she says that she was pushed into the well by

(1) 13 B. L. R., App., 20.

(2) Before Mr. Justice Phear and Mr. Justice Morris.

The 20th November 1873.

THE QUEEN v. HURRO MANJI.*

Criminal Procedure Code (Act X of 1872)
s. 263—*Verdict of Jury, when to be set aside.*

PHEAR, J.—In regard to this reference made to this Court under the provisions of s. 263 of the Criminal Procedure Code we may say that we entirely concur in the opinion lately expressed by this Court, in a recent case,—namely, “that the powers given to this Court by s. 263 are not to be lightly exercised; and that the unanimous verdict of a jury ought

not to be set aside, even if the Sessions Judge disagrees with it, unless that verdict is clearly and patently wrong, and unsustainable on the evidence.” It seems to us that the verdict in this case, with which the Sessions Judge disagrees, cannot be said to be “clearly and patently wrong, and unsustainable on the evidence.” If the statement which was made by the prisoner in Court is true and the jury have no doubt believed, that it was true (indeed according to the reference made to us by the Judge, they informed him that they did so), then their verdict was probably right in fact. We therefore think that there is not sufficient reason to interfere with the verdict which they gave. That verdict will consequently stand, and the record must be sent back again.

* Criminal Reference from the Officiating Sessions Judge of Hooghly, dated the 18th September 1873,

the prisoner. There are indeed reasons which have been placed before us by the learned Counsel who has appeared on the part of the prisoner, which might lead to the inference that the child's story cannot be in all respects very accurate. But even assuming for the moment that it is accurate, so far as she describes the facts from her own observation, still it may well enough be that the cause which made her fall into the well, and the little child Jaggernath after her, was not a push given by the prisoner.

The jury also state that the evidence was contradictory; and this remark seems to be just.

On the whole, we feel impossible to say that they were so entirely mistaken in their verdict—that they were so patently wrong—that we ought to exercise the extraordinary powers which are given to us under s. 263, and, setting aside their verdict, convict the prisoner accordingly. We think their verdict must stand, and we direct that the prisoner be acquitted of this charge and set at liberty.

1874

QUEEN
v.
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ITWARYA.

Before Sir Richard Couch, Knight, Chief Justice, and Mr. Justice Birch.

SOOJAN BIBEE AND ANOTHER (PLAINTIFFS) v. ACHMUT ALI AND
OTHERS (DEFENDANTS).*

1874
April 9.

Act I of 1872, s. 33—Evidence—Previous Deposition—Admission.

A deposition of a person in a suit to which he was not a party, is, in a subsequent suit in which he is a defendant, evidence against him and against those who claim under or purchase from him, although he is alive and has not been called as a witness. S. 33 of the Evidence Act (I of 1872) does not apply to such a deposition, but it is admissible under the sections relating to admissions, although it might be shewn that the facts were different from what they were stated to be in the former case.

A statement in a bill of sale is evidence against those who are parties to it.

Baboo *Umbica Churn Bose* for the appellants.

Baboo *Grish Chunder Ghose* for the Respondents.

The facts of this case are sufficiently stated in the judgment of the Court, which was delivered by

COUCH, C. J.—The Judge in his judgment on the appeal says, that the plaintiffs sued to obtain possession of 6 kanecs, 2 kowrees, 2 krants of land, being a one-third of nine plots; and alleged that the whole of the nine plots belonged to their mother, Bibjan Bibee, who died in 1231, that she received these lands by gift under a *hibbanama* dated the 7th Kartik 1212, from her husband Nur Mahomed; and that the plaintiffs were her two daughters, and the defendants, her two sons. He states that the defendant Arwan Bibee pleaded to the same effect as another defendant had,—namely, that the *hibba-*

* Special Appeal, No. 859 of 1873, from a decree of the Officiating Judge of Zilla Chittagong, dated the 1st of March 1873, reversing a decree of the Sudder Mansif of that district, dated the 1st of October 1872.

1874 *nama* was a fraudulent instrument, and that Bibjan Bibee never held possession under it ; and that Achmut Ali (one of the sons of Bibjan Bibee) set up the same defence, and a purchaser from Arwan Bibee did so also, they being
 SOOJAN BIBEE v. the appellants before the Judge.
 v. Achmut Ali.

He then says correctly, that it lay upon the plaintiffs to prove that they or their mother Bibjan Bibee had exercised possession in all the nine parcels at some time within twelve years before the suit, to prove the *hibbanama*, and to prove that Nur Mahomed had a good title to the lands specified above, and was in possession of them at the date of the *hibbanama*. He then states what evidence there was for the plaintiffs,—namely, three witnesses, and five documents, and he appears to consider that the evidence of the three witnesses was of no value.

Then he says ; “ Turning now to the documents,— the *hibbanama*, or the writing, or signature, or execution thereof has not been proved by any evidence whatever.” “ the fact that the *hibbanama* was then (in the former suit) used and asserted may be some evidence, but its weight is very small” and that the defendants in that suit were not in privity with the present defendants, who were no parties to the former suit.

Now, in this case, there was in evidence a copy of a deposition made by Achmut Ali in the former suit in which he said that the *hibbanama* was executed, and that Bibjan Bibee was in possession under it at a time which is within twelve years of the institution of the present suit. There was also the bill of sale to Arwan Bibee from Achmut Ali, in which the *hibbanama* was mentioned, this having been executed after the death of Bibjan Bibee, and apparently being founded upon the state of things stated in it, *vis.*, that the property had been given to Bibjan Bibee, and after her death had descended to the two sons and two daughters.

The deposition of Achmut Ali was evidence against himself; it was also evidence against Arwan Bibee, who claimed under him, and against the other appellant, who had purchased from Arwan Bibee, and who in fact claimed under both. The statement in the bill of sale was also evidence against them, because it was the statement of both the parties to it, of Achmut Ali the seller, and of Arwan Bibee the purchaser. It would also be evidence against the person who purchased from her. The Judge, therefore, when he says that the *hibbanama* has not been proved by any evidence, appears to have entirely overlooked this part of the case, and not to have had present to his mind that this deposition and the recital in the bill of sale were good proof of the *hibbanama* unless met by evidence on the part of the defendant sufficiently strong to prove that what the plaintiff alleged was not the true state of things.

The Judge then speaks of the depositions (and this is the only way in which he refers to the deposition of Achmut Ali), and says: “The other two documents, copies of the deposition of Hider Ali and Achmut Ali, two persons on all hands admitted to be alive, are wholly inadmissible, as it is not shown that these persons are dead or cannot be found, or are incapable of

giving evidence. Further the depositions in question were not given in proceedings between the same parties." He appears to have overlooked that s. 33 does not apply to the deposition of a witness in a former suit when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as a statement made by him, which would be evidence against him whether he made it as a witness or on any other occasion. It is used against him as an admission; s. 33 has no application to such a case as the present. The sections of the Evidence Act which do apply are the sections relating to admissions. The not considering the deposition of Achmut Ali as an admission was a mistake. As to the deposition of the other witness, the Judge is right. Although Hider Ali is dead, this is not a suit between the same parties, and his evidence in the former suit would not be evidence in this.

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SOOJAN BIBEK
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ACHMUT ALI.

Then the judge says: "The *hibbanama* is not proved, and I am also of opinion that there is no proof that the plaintiffs or their mother, under whom they claim, were in possession within twelve years before suit." Here he altogether ignores the statement which Achmut Ali had made, in which he distinctly said that Bibjan Bibek was in possession within twelve years. No doubt, his doing this is explained by the way in which he overlooked the effect which ought to be given to the deposition of Achmut Ali. He appears to me to have altogether disregarded what was very cogent evidence in the case, the admissions made by the parties, apparently deliberately, and which were not to be set aside merely upon the suggestion or statement made by the same persons that the facts were different from what on the former occasion they stated them to be. It might have been shown, if it were so, that this deposition was false and that the statement in the bill of sale was false; but it would require strong evidence to prove that what the parties had deliberately asserted was altogether untrue, they alleging the facts to be different in order to keep the property which they were in possession of.

I think we ought not to remand this case to be tried by another Judge; for the evidence appears to be all one way. The evidence of the plaintiffs does not appear to have been met by any evidence on the part of the defendants, and it would be an idle proceeding to send the case down to the lower Court, when, if it found contrary to such evidence as this in favour of the defendant, we should have to reverse the finding on appeal. The decree of the lower Appellate Court must be reversed, and the decree of the first Court, the judgment of which appears to be a proper one, will remain. The appellant will have the costs in this Court and in the Lower Appellate Court.

Before Mr. Justice Phear.

WOOD v. WOOD AND ANOTHER.

1875

April 1.

Dissolution of Marriage—Order as to settled Property—Divorce Act
(IV of 1869), s. 40.

By an ante-nuptial settlement, A settled certain immoveable property in Calcutta, to which he was absolutely entitled, upon himself for life, then upon his intended wife for life, and then upon the children of the marriage; but in the event of the intended wife dying in his lifetime without leaving issue, then upon himself, his heirs and assigns for ever. The marriage having been dissolved on the ground of the adultery of the wife, before any children were born of the marriage, and the wife having subsequently married the co-respondent, by whom she had children, and with whom she continued to live, the Court, under s. 40, Act IV of 1869, declared the settlement void as regards the wife, and directed the trustees to reconvey the property to A for an absolute estate.

In this case a decree absolute had been made, dissolving the marriage on the ground of the wife's adultery. There were no children of the marriage, and the wife had, since the decree, married the co-respondent, by whom she had children, and continued to live with him.

By an ante-nuptial settlement the petitioner had settled certain property in Calcutta, to which he was absolutely entitled, on himself for life, and after his death on the respondent for life, and after her death on the children of the marriage; but if the respondent should die in his lifetime without leaving issue, then on himself, his heirs and assigns for ever. The respondent was not at the time of the marriage possessed of any property.

Mr. Macrae, on behalf of the petitioner, moved, on notice to the respondent and co-respondent, for an order that, in the event of the respondent surviving the petitioner, the property, the subject of the settlement, might be applied by the trustees of the settlement as though the respondent had predeceased the petitioner, or were dead at the date of the application; or that the property might be otherwise applied for the petitioner's benefit. He cited *Pearce v. Pearce* (1), but pointed out that in the present case there were no children of the marriage.

Neither the respondent nor the trustees appeared.

PHEAR, J., made an order declaring the settlement void as regards the respondent, and directing the trustees to reconvey the settled property to the petitioner for an absolute estate.

Attorney for the petitioner: Mr. W. J. Watson.

Before Mr. Justice Glover and Mr. Justice Mitter.

RAM CHUNDER SINGH, GHATWAL OF PATHROLE, PERGUNNA SONTHAL
(PLAINTIFF) v. RAJA JOHER JUMMA KHAN AND OTHERS (DEFENDANTS).*

Ghatwali Tenures in Beerbhoom—Compensation—Regulation XXIX of 1814.

1875
March 15.

Where land forming part of a ghatwali tenure in the district of Beerbhoom was taken up for public purposes, *Held* that neither the zemindar nor the under-tenants of the ghatwal could claim a proportionate share in the compensation money payable for such land.

The money so obtained carries with it all the incidents of the original ghatwali tenure, and the ghatwal for the time being is entitled only to the interest accruing therefrom during his lifetime.

In 1866 and 1870, lands appertaining to Talook Pathrole in the district of Beerbhoom, a ghatwali mahal belonging to the plaintiff, at that time a minor, were taken up for the purpose of constructing thereon a portion of the East India Railway Chord Line Road. Compensation for the same was duly assessed at Rs. 12,488-14-9, to which the plaintiff claimed to be solely entitled. Disputes, however, having arisen between the plaintiff and the first defendant, the zemindar, and certain other defendants, who held shikmi ghatwali mukarrari rights within the said tenure, as to the right of participation in the said sum, it was ordered that the money should be deposited in the Treasury of Deoghur, and should remain there until the respective rights of the claimants should have been established. The present suit was thereupon instituted on behalf of the plaintiff, who was at the time a minor under the Court of Wards, against the defendants, to establish his exclusive right to the said sum with such interest as might be accruing thereon.

The first Court was of opinion that the money in deposit ought to be divided in certain specified proportions between the plaintiff, the zemindar, and the shikmi ghatwali tenant, and decreed accordingly.

The plaintiff appealed to the High Court.

Baboo Mohini Mohun Roy, Sreenath Dass, and Luckhy Churn Bose for the appellant.

Baboo Hem Chunder Banerjee and Gopeshnath Mookerjee for the zemindar respondent.

The other respondents did not appear.

Baboo Mohini Mohun Roy.—The Court below has misapprehended the position and rights of the zemindar with respect to ghatwali talooks. The appellant is virtually independent of his zemindar; he pays revenue direct to Government; see Regulation XXIX of 1814. Under s. 4 zemindars

* Regular Appeal, No. 22 of 1874, against a decree of the officiating Judge of Zilla Beerbhoom, dated the 29th October 1873.

1875
RAMCHUNDER SINGH are only entitled to a fixed yearly sum. With respect to the shikmi ghatwali tenants, they can have no valid permanent interest in the property—*Grant v. Bangsi Deo* (1).

v.
RAJA JOHER JUMMA KHAN. *Baboo Hem Chunder Banerjee* for the zemindar respondent.—The sum payable to the zemindar by the ghatwal is rent, though paid in the first instance through the Collector. The zemindar, therefore, has an interest sufficiently permanent to entitle him to share in the compensation money. The possibility of future loss in the receipt of this rent occasioned by the diminution in size of the ghatwali estate also entitles the zemindar to a share. Reasoning from analogy to the case of a zemindar and his patnidar, the zemindar is entitled to a share—*Maharaja Mahatab Chand Bahadur v. Government* (2).

Baboo Mohini Mohun Roy in reply.

The judgment of the Court was delivered by

MITTER, J.—This suit was instituted on behalf of Ram Chunder Singh, a minor, who has now attained his majority, for obtaining Rs. 15,125-11-8 deposited in the Government Treasury of Deoghur, being the compensation money for 1,765 bigas 9 cottas 14 chittacks of land, appertaining to the ghatwali talook Pathrole, taken for the construction of a railway. The allegation of the plaintiff is that he is entitled to the whole of this compensation money, and the defendants having unjustly claimed the same, it has been detained in the Treasury, leaving the contending parties to have their respective rights settled by a competent Civil Court.

For the purposes of this appeal it is sufficient to notice only the objections of two sets of defendants, viz., the zemindar within whose zemindari this ghatwali estate is situated, and the representatives of the defendant No. 29, Bunwari Lal, who has died since the institution of the present suit.

The zemindars claim a share in the compensation money upon the ground that the land taken, though appertaining to the ghatwali mehal of Pathrole, yet is a component part of their zemindari; that the ghatwals hold their tenures on the condition of performing certain services, and if they should cease to perform those services, or the services become wholly unnecessary, the lands of the tenures would revert to them; and that under the provisions of Regulation XXIX of 1814 should any increase happen to be made in the ghatwali revenue, the increase shall belong to them. Therefore they contend that their interests in the lands taken are of such a nature as to entitle them to claim a participation in the compensation money.

The defendant Bunwari Lal alleged in his written statement that he holds a sub-tenure in the plaintiff's ghatwali mehal, charged with a fixed annual rent of Rs. 104; that a portion of the lands taken falls within his sub-tenure the compensation money in respect of which was therefore due exclusively to,

(1) 6 B. L. R., 652.

(2) 16 S. D. A., 1860, 328.

him. He further stated that out of the compensation money which thus falls to his share, he had transferred his rights in respect of Rs. 4,987-7-6 to one Thakoor Ram Laha, of Pathrole, and that he was entitled to receive the balance, viz., Rs. 713-9-9.

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**RAMCHUNDER
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**RAJA JOHER
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- The lower Court has apportioned the whole amount of the compensation money in deposit in the Deoghur Treasury thus : Rs. 4,929-3-10 to the plaintiff; Rs. 3,167-4 to the zemindars; and Rs. 6,291-2-3 to the widows of, and the purchaser from, the late Bunwari Lal Singh.

The plaintiff has preferred this appeal on the ground that he is entitled to the whole amount, and the lower Court is wrong in allowing any share to the defendants. As the objections upon which these two sets of defendants rest their claims are quite distinct, we must deal with them separately.

As regards the zemindar's claim, it is clear to me that they are not entitled to any share. This is one of those ghatwali estates, which are situated in the district of Beerbhoom, and which have become a subject of special legislation. Regulation XXIX of 1814 was passed to define and to determine the rights between the ghatwals, the zemindars, and the Government. The effect of this legislation was to declare that these ghatwali lands should continue to be considered as a part of the zemindari of Beerbhoom; that the ghatwals should pay the revenue assessed upon them direct to the Government treasury; that the difference between the amount assessed on the ghatwals and the fixed assessment of revenue payable to Government by the zemindars on account of the ghatwali lands should be paid to the latter and their heirs and successors in perpetuity; that so long as the ghatwals should pay the amount assessed upon them punctually and perform the services imposed upon them, they and their descendants in perpetuity should be maintained in possession of the ghatwali lands; and that lastly, in case of any default in the punctual discharge of the revenue assessed by any of the ghatwals, the Governor General in Council would be competent to cause the defaulting tenure to be sold, or to make it over to a fresh grantee upon the same revenue, or upon an increased or reduced assessment as to the Government might appear meet and proper. There was a further provision made which was entirely in favor of the zemindar, viz., should any increase of revenue be obtained on account of any arrangement last adverted to, the said increase should be paid to the zemindars, their heirs and successors.

From these provisions it is clear that the profits of the zemindars out of these ghatwali lands have been so far fixed, that they would not, under any contingency, fall below the amount mentioned in s. 4 of the Regulation above quoted, viz., the difference between the revenue assessed on the ghatwals and the fixed assessment of revenue payable by the zemindars on account of these ghatwali lands. It is true that, under the last provision referred to above (see s. 5 of the Regulation), there is a chance of their profits increasing, but under no circumstances are they liable to diminution.

Now, in this case, unless it is shown that the zemindars have suffered any

1875 loss, they are not entitled to any compensation. It is clear that they have sustained no loss at present, because notwithstanding the lands taken out of their zamindari, they will continue to receive the same profits which they have been hitherto enjoying. Under s. 4 of the Regulation in question they are entitled to receive from Government a fixed amount, quite irrespective of the quantity of land held by the ghatwals. All that they can say, is that the lands being severed from their zamindari, their chance of prospective gain under s. 5 of the Regulation is to a slight extent diminished. But this is such a remote chance, that no appreciable value can be assigned to it. For these reasons, I think the zamindars are not entitled to participate in the compensation money in deposit.

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JUMMA KHAN.

Then we come to the claim put forward by Bunwari Lal. It is evident that he held a subordinate tenure within the plaintiff's ghatwali mehal, and the said tenure is still in the possession of his widows. It has also been established upon the evidence that this tenure was created by an ancestor of the plaintiff to provide for the maintenance of a junior branch of the ghatwal's family. It has been contended on behalf of the plaintiff, that it is not sufficient to show that Bunwari Lal during his lifetime was in possession, and his legal representatives are still in possession of this subordinate tenure; but it must be established that Bunwari Lal was, and the widows are still, in rightful possession of it, and that it is of a permanent nature, so that the superior ghatwal cannot at his will determine it. I think that this contention is valid. These defendants, it appears to me, are not entitled to any share in the compensation money, if it can be shown that they are allowed to remain in possession of the subordinate tenure by mere sufferance of the superior holder, who can at any moment put an end to their possession. From the nature of the tenure held by the plaintiff, it follows that the arrangement made by his ancestor to provide for the maintenance of a junior branch of the family is not binding upon him. He is fully competent to resume possession of these lands; see *Grant v. Bangsi Deo* (1).

Bunwari Lal therefore not having during his lifetime any valid right to any portion of the lands taken, his representatives are therefore not entitled to receive any share in the compensation money, the whole of which therefore should be paid to the plaintiff.

But the plaintiff is a ghatwal. His title is not that of an absolute owner. He is only entitled to enjoy the profits of the ghatwali mehal during his life without power of alienation. The compensation money in deposit is only a money equivalent of a portion of that mehal. He can therefore only enjoy its interest without any right of spending any portion of it. He is bound to keep its interest as a part of the ghatwali property, so that his successor may obtain it, quite undiminished in value. This being the nature of his title we ought not to declare his right to obtain this money without imposing upon him certain conditions for the purpose of preserving it in future as part of the

assets of the ghatwali mehal. These observations apply only to that part of the claim which represents the principal amount of the compensation money. As to the interest which has subsequently accrued, the plaintiff is entitled to obtain it as absolute owner, because during his life he is entitled to enjoy the usufructs of the ghatwali mehal. To guard against the contingency of this principal amount of the compensation money being in any way wasted, I think we ought to direct that the plaintiff must give ample security to the satisfaction of the lower Court for the due preservation of it as part of the ghatwali property, before any decree can be given in his favor.

The case will therefore go back to the lower Court with this direction, that on the plaintiff's executing a valid and sufficient security to the satisfaction of that Court, for the due preservation of the principal amount of the compensation money now in deposit in the Treasury of Deoghur as part of the ghatwali property in his possession, a decree will be drawn up declaring him entitled to obtain the whole of the money in deposit in that Treasury, both principal and interest, on account of the compensation of the lands taken from his talook for public purposes.

As the plaintiff has succeeded in this suit, he is entitled to the whole of the costs of this litigation, both in this Court, as well as in the Court below.

1875
Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Pontifex Jan'y. 4.

HUBROSOONDERY DOSSEE AND ANOTHER (DEPENDANTS) v.
 CALLYPUDDO DU'T (PLAINTIFF).

*Practice—Appeal—Delivery of Paper Books—Costs—Rule 49 of
 Original Side.*

Where the respondent has not delivered paper books, as he is allowed to do by Rule 49 of the Rules of the High Court, Original Jurisdiction, or default of the appellant to deliver them, and the appellant does not appear at the hearing, the appeal will be dismissed without costs.

APPEAL from a decision of Macpherson, J., dated the 12th of June 1874.

On this appeal being called on for hearing, the appellant did not appear, and no paper Books had been delivered for the use of the Judges in accordance with Rule 49 (dated 15th December 1864) of the Rules of the High Court, Original Jurisdiction. That rule says :—"When an appeal is preferred from a decree of the High Court, Original Jurisdiction, to the High Court, Appellate Jurisdiction, the appellant or his attorney shall, within six days from the presentation of the memorandum of appeal, deliver to the Registrar, Original Jurisdiction, for the use of the Judges, two paper books containing a copy of the plaint, written statement, depositions of witnesses, and of the decree and judgment and memorandum of appeal. The respondent or his attorney may deliver such paper books if the appellant or his attorney shall fail to deliver the same within the time limited."

1875

HURRO-
SOONDREY
DOSSEN

v.

GALLYPUDDO
DUTT.

Mr. *Lowe* for the respondent applied that the appeal should be dismissed with costs.

COUCH, C.J. (PONTIFEX, J., concurring).—In this case no one appears for the appellant, and paper books have not been delivered. The learned Counsel for the respondent asks that the appeal may be dismissed with costs. The 49th of the Rules of the High Court of Judicature, Original Jurisdiction, provides that if the appellant does not deliver the paper book, the respondent may do so. But the respondent has not done so, and therefore the appeal will be dismissed without costs.

Attorney for the appellants : Baboo *Shamuldhone Dutt*.

Attorney for the respondent : Mr *Gregory*.

Before Mr. Justice Markby and Mr. Justice Lawford.

1875

April 30.

GOBINDO CHUNDER DUTT (PLAINTIFF) v. HENDRY AND ANOTHER
(DEFENDANTS).*

*Right of Advocate to appear—Appeal from Mofussil—Non-Intervention of
Vakil or Attorney.*

An advocate of the High Court may appear at the hearing of an appeal from the mofussil on the direct instruction of a client, and without the intervention of vakil or attorney.

Mr. *Palit* (with him Baboos *Ishan Chunder Chuckerbutty* and *Krishno Coomar Bhattacharjee*) for the appellant.

Mr. *R. Allen* for the respondents.

On the case being called on, Baboo *Ishan Chunder Chuckerbutty* called the attention of the Court to the fact that the Counsel for the respondents was not instructed by a vakil or an attorney, and on behalf of the pleaders he objected to Mr. *Allen* appearing.

Cur. adv. vult.

The judgment of the Court was delivered by

MARKBY, J.—In this case an objection was taken that Mr. *Allen*, who is an advocate of the Court, could not appear for the respondent in this special appeal, he being instructed by the defendant in person and not by a pleader. We did not decide upon this objection at the time, because it was represented that a decision had been given on this point. We are unable to find any decision of this Court in any way bearing on it. In one case the late Chief Justice and myself held, that an advocate of this Court could not appear upon the instruction of a pleader of the Small Cause Court (1), but that does not affect the present question.

*Special Appeal, No. 1952 of 1874, from a decree of the Judge of the 24-Pergannas, dated the 19th May 1874, affirming a decree of the Munsif of Alipore, dated the 19th September 1873.

(1) *Moran v. Dewan Ali Sirang*, 8 B. L. R., 418.

On the other hand, it has been held in England that a party who has appeared to a suit in person may himself instruct a barrister to appear for him at the trial—*Doe d. Bennett v. Hale* (1)—and that a barrister may appear accordingly. In this case the respondent himself instructs Mr. Allen, and he has not employed any pleader in this Court. We think we are bound to allow Mr. Allen to argue this appeal as advocate for the respondent.

1875

GOBINDO
CHUNDER
DUTT
v.
HENDRY.

Before Mr. Justice Phear,

WOOMA CHURN DHOLE v G. TEIL.

Witness—Privilege from Arrest—Bona Fides.

Where a witness was arrested in execution of a decree, and the circumstances under which the arrest had taken place shewed the absence of a *bona fide* belief on his part that his attendance at Court was required for the purpose of giving evidence in the case in which he had been subpoenaed, the Court refused to allow his claim to privilege from arrest.

1875

May 20.

See also
1. L. R.
1 Cal. 89.

In this case the plaintiff had obtained a decree, in execution of which the defendant, who resided out of Calcutta, had, on 19th May, been arrested in Calcutta. On being brought before the Court, he claimed to be privileged from arrest on the ground that he had come down to Calcutta to give evidence in a suit in the High Court in obedience to a subpoena which had been served upon him, and that he was returning to his residence at the time the arrest took place. It appeared that a subpoena had been served on the defendant requiring his attendance on the 10th instant, "and on every succeeding day until the case was called on," to give evidence in a case which stood twenty-fourth on the board of remanet causes, and which could not possibly come on for trial for some days. From the defendant's own evidence it appeared that, on the day of his arrest, he had twice visited the Court, and finally left about a quarter past four; that he had not taken the shortest way home but had deviated some considerable distance for the purpose of picking up a daughter. The defendant further admitted that he knew as a fact that no case could be called on which did not appear in the peremptory board for the day; that he had looked for his case in the cause board published in the newspapers two days previous to his arrest, but had omitted to do so on the day of his arrest. It was further proved by the clerk of the attorney who had served the subpoena on the defendant, that he had on two occasions told the defendant that there was no immediate chance of the case coming on, and that a written notice would be sent when his evidence would be required.

Mr. Piffard for the defendant.—A witness disobeying his subpoena renders himself liable to a criminal prosecution; see s. 174 of the Penal Code. In

1875 England, under similar circumstances, a civil action might possibly lie.
 [PHEAR, J.—In England, the witness may be arrested and imprisoned for contempt.] Yes, but that is never done after a case is closed. The deviation is not material, a slight deviation does not deprive a witness of his privilege—
 WOOMA
 CHURN Dhole
 v.
 TEIL.
Childerston v. Barrett (1), *Lightfoot v. Cameron* (2), *Pitt v. Coomes* (3), *Righton v. Nisbett* (4), *Walpole v. Alexander* (5), and *Newton v. Harland* (6)

Mr. Macras, for the judgment-creditor, relied upon the evidence as showing that the defendant coming to Calcutta was not *bond fide* in order to attend the Court as a witness. As to the deviation he would not press that point, against the defendant; he cited *Magnay v. Burt* (7), *Lightfoot v. Cameron* (2), and *Meekins v. Smith* (8).

The judgment of the Court was delivered by—

PHEAR, J.—The privilege which Mr. Teil now claims of freedom from arrest is not given by the law for the personal benefit of the individual affected, but for the furtherance of the public interests and for the better administration of justice, and the legal definition of the circumstances under which it is claimable, *viz., cundo, morando, et redeundo*, is in itself sufficient to show what really is the scope of the privilege. And I think it is certain on the cases which the learned counsel on both sides have brought under my notice, that even if it be not strictly necessary that there should be a suit coming on for trial, or actually proceeding by way of trial, yet at any rate the person claiming the privilege must be coming, staying, and returning in the real belief that his attendance had been needed for the purpose of an actual trial. On the facts which have been proved before me out of Mr. Teil's own mouth, I feel obliged to say that I do not think this was the case with him. There was, in fact, no trial coming on, and Mr. Teil had no reasonable grounds for thinking that any trial was coming on *i.e.*, the trial on which he was interested. He had been told that it would not come on for some time, and he had also been told that he would have written notice sent to him of the time when it was necessary for him to come. He also says that he knew that it could not come on unless it appeared in the published board of peremptory causes for the day, and he had satisfied himself on the day before yesterday that it was not in that day's board. Curiously enough, he had abstained from satisfying himself as to whether it was in yesterday's board. I think it is true that he did visit the Court yesterday, probably both in the morning and afternoon. Possibly, he had done so for many days before, and intended to do so for many days to come. I repeat I do not think on the evidence before me that his object in visiting the Court was the belief that he was wanted for the purpose

(1) 11 East., 439.

(2) 2 Wm. Bl., 1113.

(3) 5 B. & Ad., 1078.

(4) 1 Moo. & Rob., 347

(5) 3 Doug., 45.

(6) 8 Scot., 70.

(7) 5 Q. B., 381.

(8) 1 H. Bl., 636.

of giving evidence in the case in which he had been summoned. If I allowed the privilege in this case, it would really be laying down that any one living out of Calcutta could assure himself of immunity from arrest on civil process whenever he liked.

1875

WOOMA
CHANDHOL
v
TEIL.

• Attorneys for the judgment-creditor : Messrs. *Dhu* and *Mitter*.

Attorney for judgment-debtor : Mr *T. H. Hume*.

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ACCRETION—Reformation—Lands Temporarily or Permanently Settled] Where lands submerged by a river reform, and can be identified as having formed a part of a particular estate, they belong to the owner of that estate, whether his estate consists wholly of permanently settled lands, or whether it has been partly acquired as an alluvial accretion under temporary settlements made by Government with him as owner of permanently settled lands. HURSAHAI SINGH v. SYUD LOOTF ALI KHAN ... 268	
—on old Site—Assessment of Addition to Estate paying Revenue directly to Government—Jurisdiction of Civil Court—Immunity of Officer acting in Good Faith—Act IX of 1847, ss. 6 & 9.] No suit will lie in a Civil Court to recover possession of lands which have been added to an estate paying revenue directly to Government by the Revenue Authorities after an inspection of maps under s. 6 of Act IX of 1847, although such lands have reformed on an old site of land belonging to another. DEWAN RAMJEWAN SINGH v. COLLECTOR OF SHAHABAD ... 221 note	
—Island-chur—Rights of Government—Reg. XI of 1825, s. 4, cl. 3—Act IX of 1847, s. 7.] The Government is not entitled, under cl. 3, s. 4 of Regulation XI of 1825, to take possession of land which has reformed on an old site of land belonging to another, although the reformation forms an island, and is surrounded by a channel which is not fordable. COLLECTOR OF RAJSHAHYE v. RANI SHAMASOONDREE DEBEA ... 219	
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_____, ss. 2 & 32	411 note
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_____, s. 5	367
<i>See</i> JURISDICTION:	
_____, s. 7	418 note
<i>See</i> MORTGAGEE'S LIEN.	
_____, s. 15— <i>Declaratory Decree—Substantial Relief.</i>	
The words of s. 15, Act VIII of 1859, are to be interpreted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief if relief had been prayed for.	
A suit by a party in possession for a declaration of title and to set aside, not any deed nor any act of the defendant, but a mere allegation on his part that he holds under a certain tenure, is not maintainable.	
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_____, s. 210— <i>Execution of Decree passed against Deceased Person.</i>	
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—1870—VII, SCHED. I, CL. 11— <i>Letters of Administration—Estate of Hindu in hands of deceased Daughter's Representatives—Trust Property.</i>	On the death of a Hindu lady who had succeeded to her father's property for the estate of a Hindu daughter, it appeared that certain Government promissory notes, which formed a portion of the father's property, were then standing in her own name. On an application by the sons for letters of administration to her estate, held that, on her death, the grandfather's estate became in the hands of her representatives trust property, in respect of which no duty was payable under the Court Fees Act.				
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—s. 33— <i>Evidence—Previous Deposition—Admission.</i>					
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A deposition of a person in a suit to which he was not a party is, in a subsequent suit in which he is a defendant, evidence against him and against those who claim under or purchase from him, although he is alive and has not been called as a witness. S. 33 of the Evidence Act (1 of 1872) does not apply to such a deposition, but it is admissible under the sections relating to admissions, although it might be shown that the facts were different from what they were stated to be in the former case.

A statement in a bill of sale is evidence against those who are parties to it.

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—IX, s. 27— <i>Small Cause Court, Law of—Agreement between Hindus—Acts IX of 1850 & XXVI of 1864—21 Geo. I I c. 70, ss. 17 & 18—Letters Patent, 1862, cl. 18—Letters Patent, 1865 cl. 19—Contract in Restraint of Trade.</i>	The effect of Act XXVI of 1864 is that suits in the Small Cause Court are to be decided according to the law or equity administered in the High Court; by the Charter of 1862 that law or equity was to be "the law or equity which would have been applied by the Supreme Court;" and by the Charter of 1865 that "which would have been applied by the High Court," under the Charter of 1862.				
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The Statute 21 Geo. III, c. 70, which applied to the Supreme Court, and gave to Hindus the right to have matters of contract decided by their own laws, became, if its provisions apply to the High Court, part of the law of that Court not by virtue of the Statute itself, but by virtue of the Charter which was subject to alteration by the Governor-General in Council; and having ceased to have any operation as an Act, it was unnecessary to repeal it expressly by the Contract Act (IX of 1872).

That Act is applicable to Hindus residing in Calcutta; therefore, where the plaintiff, a Hindu, agreed with the defendants, also Hindus, that he would cease to carry on his business in a certain locality in Calcutta, in consideration of receiving from them a specified

sum, it was held in a suit to enforce the contract that such an agreement was void under s. 27 of the Contract Act. The words "not inconsistent with the provisions of this Act" in s. 1 of the Contract Act apply to "any usage or custom of trade" or "any incident of any contract."	Page
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<i>decree.] A obtained a decree against O for possession and me sne</i>	
<i>profits, but no specific amount of mesne profits was then assessed.</i>	
<i>In 1864 A, in execution of his decree, attached land belonging to O,</i>	
<i>but the execution case was struck off the file in 1865. After several</i>	
<i>ineffectual proceedings A reattached the property in March 1869.</i>	
<i>In execution of a decree against O, B had in February 1869 attached</i>	
<i>the same property. The property was sold under A's attachment in</i>	
<i>May 1869, and on the application of A the Subordinate Judge, on the</i>	
<i>strength of A's attachment in 1864, gave priority to A's claim over</i>	
<i>that of B. The balance of the sale proceeds after satisfaction of</i>	
<i>A's decree were only sufficient to cover a small portion of the decrep</i>	
<i>obtained by B. In a suit by B against A under s. 270, Act VIII</i>	
<i>of 1859, to recover the amount of her c'aim which remained</i>	
<i>unsatisfied,—held that the attachment of A in 1864, on the strength</i>	
<i>of which A's claim was considered by the Subordinate Judge to</i>	
<i>have priority over that of B, was not a sufficient and valid attach-</i>	
<i>ment under s. 270. The attachment contemplated by that section</i>	
<i>means an attachment after a final money-decree. Held also, that the</i>	
<i>striking off of the execution case of A in 1865 caused an exting-</i>	
<i>quishment of the effect of the attachment of 1864.</i>	
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CO-SHARERS— <i>Payment of Arrears of Revenue by one Co-sharer—Charge on Share of Estate in hands of a Purchaser.</i> <i>B.</i> the owner of a fractional share in a joint mehal, mortgaged, her share to <i>A.</i> <i>A.</i> obtained a decree on her mortgage, and attached <i>B.</i> 's share in the estate, and afterwards purchased the same at the execution-sale. Whilst her share was under attachment, <i>B.</i> stopped paying the Government revenue, whereupon the plaintiff, a co-sharer in the estate, paid the whole revenue in order to save the mehal from sale. In a suit brought against <i>A.</i> and <i>B.</i> for recovery of the sum paid by the plaintiff on behalf of <i>B.</i> 's share.	
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DISSOLUTION OF MARRIAGE— <i>Order as to Settled Property—</i> <i>Divorce Act (IV of 1869), s. 40.</i> By an ante-nuptial settlement, A settled certain immovable property in Calcutta, to which he was absolutely entitled, upon himself for life, then upon his intended wife for life, and then upon the children of the marriage; but in the event of the intended wife dying in his lifetime without leaving issue then upon himself, his heirs and assigns for ever. The marriage having been dissolved on the ground of the adultery of the wife, before any children were born of the marriage, and the wife having subsequently married the co-respondent by whom she had children, and with whom she continued to live, the Court, under s. 40, Act IV of 1869, declared the settlement void as regards the wife, and directed the trustees to reconvey the property to A for an absolute estate.	
WOOD v. WOOD	App. 6
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—, ADMISSIBILITY OF— <i>Decree barred by Limitation.</i> A decree for rent is admissible in evidence against a defendant to prove the rate of rent he was liable to pay, although the decree has not been executed for three years, and has therefore become barred under the law of limitation.	
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A decree for rent in a suit under Act X of 1859 against the defendant, an intervenor, which has remained unexecuted for more than three years, is not in a subsequent suit admissible in evidence to show that the defendant had not, during a period subsequent to the decree, been in *bona fide* receipt of the rent.

RAM SUNDER TEWARI v. SRIMUNT DEWASI ... 371 note

EVIDENCE OF CHILD, ADMISSIBILITY OF—*Competent Witness*
—*New Trial*—*Act X of 1873 (Oaths Act), ss. 5, 13*—*Evidence Act (I of 1872), s. 118*—*Criminal Procedure Code (Act X of 1872), Chap. XV.*] The accused was charged with throwing B and C down a well. She was charged with the murder of B under s. 302 of the Penal Code, and on that charge she was tried and acquitted. Thereupon the Joint Magistrate, without holding any further preliminary enquiry committed her on a charge under s. 307 of attempting to murder C. The only eye-witness of the offence, according to the Sessions Judge, was a child, and as she did not understand the nature of an oath or solemn affirmation, her evidence was taken on simple affirmation. The jury found the prisoner guilty and she was sentenced to ten years' transportation: *Held*, that the omission to administer either an oath or solemn affirmation, although knowingly made, did not render the child's evidence inadmissible. *Held* also, that the omission by the Joint Magistrate to hold a preliminary inquiry on the charge under s. 307 being an irregularity which prejudiced the prisoner, in her defence, the proceedings should be quashed, and a new trial held.

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EXECUTION OF DECREE ... 287, 288 note, 291 note; 323

See KISTBANDI. See ATTACHMENT, PRIORITY OF.

— *Limitation Act (IX of 1871), Sched. ii, No. 167—Bona fides.*] A decree-holder, applying for the execution of his decree, is entitled, under the provisions of Act IX of 1871, to have such execution upon his showing that his application is made within three years from the date of a previous application to the Court to enforce the same decree, or from the date of issuing notice under s. 216 of the Code of Civil Procedure in the same matter.

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— — — — —.] Under Act IX of 1871, Sched. ii, No. 167, a decree-holder is entitled to have execution of his decree within three years of a notice under s. 216, Act VIII of 1859, or of a previous application for execution without any reference to the question of *bona fides*.

ROHINI NUNDUN MITTER v. BHOGOBAN CHUNDER ROY 144 note,

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EXECUTOR, PURCHASE BY—*Fiduciary Relationship*—*Renunciation of Executorship*—*Administration Suit*—*Suit against Purchaser from Executor to set aside Sale.*] D, a Hindu, died, leaving three sons S, S C, and R, who on his death made a partition of his estate, and S covenanted with S C to discharge all claims made against the estate of D. In 1828, B, who claimed a portion of the share taken by S C on partition with mesne profits, filed a bill in the Supreme Court against S C and others as representatives of D, and obtained a decree for Rs. 200,000. Pending this litigation S C died, leaving six sons, J, M, H, P, C, and S'M, and a will made before the birth of S M, by which he left all his property to his sons other than

S M. On the death of S C, J, as one of the executors of his will, compromised B's suit so far as it related to the estate of SC, for Rs. 80,000; and afterwards, in the same capacity, sued the representatives of S to recover that amount and the costs in the suit brought by B, and obtained a decree for Rs. 1,70,000. In the meantime H died, leaving the plaintiffs his sons and heirs, and his brothers J and M, his executors. J renounced the executorship. M, on 3rd June 1854, as executor of H, executed a deed of assignment, by which he conveyed to J and S M, for Rs. 5,000, the interest of the plaintiffs in the decree obtained by J, and subsequently at a sale of property belonging to the representatives of S in execution of the decree, J himself became the purchaser. In 1857, in an administration suit, which had been brought by the plaintiffs to compel M to account for the assets received by him from the estate of H, the Master was directed to take an account, which was accordingly done. In a suit brought by the plaintiffs, the sons of H, against J, M, and S M, to set aside the deed of 3rd June 1854, —*Held*, that notwithstanding the renunciation of executorships by J, he stood in a fiduciary relation to the plaintiffs, and the assignment, being found to have been made for an inadequate consideration, was ordered to be set aside on the plaintiffs paying the purchaser, J, the amount of the purchase-money.

A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside.

DHONENDER CHUNDER MOOKSEJEE v MUTTI LALL MOOKSEJEE 276
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See RAILWAY COMPANY.

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See MORTGAGE.

GHATWALI TENURES IN BEERBHOOM—*Compensation—Reg. XXIX of 1814.* Where land forming part of a ghatwali tenure in the district of beerbhoom was taken up for public purposes, *held* that neither the zemindar nor the under-tenants of the ghatwal could claim a proportionate share in the compensation-money payable for such land.

The money so obtained carries with it all the incidents of the original ghatwali tenure, and the ghatwal for the time being is entitled only to the interest accruing therefrom during his lifetime.

RAM CHUNDER SINGH v. RAJA JONAR JUMMA KHAN App. 7
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Debutter Property—Sebait—Power of Alienation—Res Judicata.] As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable.

It is competent, however, for the sebait in charge of property dedicated to the worship of an idol, in his capacity of sebait and as manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power to incur such debts is to be measured by the existing necessity for incurring them; the authority of the sebait being in this respect analogous to that of a manager for an infant heir.

It being competent for a sebait to borrow money for necessary purposes, it follows that judgments obtained against a former sebait in respect of debts so incurred are binding upon succeeding sebaits who form a continuing representation of the *debutter* property.

But, before applying the principle of *res judicata* to such judgments, the Court should be satisfied that the judgments, relied upon, are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried, and decided in the suits which led to them.

Execution of such judgments should be decreed only against the rents and profits of the *debutter* property,

PROSUNNO KUMARI DEBYA v. GOLAB CHAND BAROO ... 450

Inheritance—Daughter's Estate—Sridhan—Jain Law—Mitakshara.] Under the Mitakshara law the estate which a daughter takes in property inherited by her from her father, is only a qualified estate, and on her death, such property descends to the heirs of her father, and not to her own heirs.

CHOTAY LAL v. CHUNNOO LALL ... 235

Mitakshara.] Under the Mitakshara, the unmarried daughter succeeds only in priority to her married sisters, and not to the ultimate exclusion of such sisters's right of inheritance from their father. Therefore, when a Hindu, under the Mitakshara, died, leaving two daughters, one married and the other unmarried, and the latter succeeded to the father's estate, and then married and subsequently died, leaving a son and her sister, her surviving, —*held*, that the sister was entitled to succeed to the property as the next heir of the father.

DOWLUT KOOR v. BUNMADEO SAHOY ... 246 note

Daughter, Alienation by.] A daughter inheriting property from her father takes a life interest only in such property, and has no power of alienation beyond her lifetime. The heir of the father on her death takes the property as heir of the ancestor, and not as her heir.

DEO PRESHAD v. LUTJOO ROY ... 245 note

Exclusion from—Blindness—Dayabhaga.] The blindness which, under the Hindu law as recognized in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness, and not to loss of sight which has supervened after birth.

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HINDU LAW— <i>Mithila—Son's Interest in ancestral Estate.</i>] Ancestral property which descends to a father under the Mithila law is not exempted from liability to pay his debts because a son is born to him. Such exemption can only be pleaded when the nature of the debts incurred by the father is such as would free the son from the usual obligation of discharging his father's debts out of the ancestral estate.	
A decree, properly obtained against the father, can be executed by sale of such ancestral estate, and the interest of the sons as well as of the fathers will be bound by it. A purchaser at such sale is not bound to inquire into the circumstances under which the decree was made.	
GIRDHAREE LALL v. KANTOO LALL.	
MUDDUN THAKOOR v. KANTOO LALL	187
<i>Will—Joint Family—Powers of Kurta—Limitation—Acknowledgment by Kurta or by Executor under Hindu Will—Clause for Payment of Debts—Charge—Acquiescence—Guardian under Act XL of 1858—Appeal—Act VIII of 1859, ss. 237 & 348—Mortgage—Decree for Sale and Payment of Deficiency—Costs.]</i> H, a Hindu, died, leaving two adult and two minor sons, and having made a will or <i>anumatipatra</i> addressed to his two eldest sons L and G, whom he thereby appointed <i>malik mukhtars</i> of the whole of his estate with full powers of management. He directed them to maintain his widow and minor sons, and to pay the marriage expenses of the latter out of the joint estate; and further directed them to pay his liabilities, and, if necessary, to raise money for that purpose by sale or mortgage; the necessary documents to be signed by L and G, "the names of the infants being signed by you as guardians and executors." In case of the death of either L or G, the will provided that all the powers of the executors should be vested in the survivor, the minors to have the same powers upon attaining majority. The will further provided that the executors should, when the minors came of age, "make over to them with explanation the share of each;" and that the four sons should take the property in equal shares. L died after his father, leaving a widow and having made a will, whereof he appointed G executor, and G subsequently obtained a certificate under s. 7, Act XL of 1858, in respect of the property of his minor brothers. Thereafter G, by a deed in the English form, which was executed by him alone "as executor of H" and also "as executor of L," mortgaged a portion of the property to the plaintiff to secure Rs. 6,847-3-3. Of this sum Rs. 947-3-3 were advanced to G at the time of the mortgage, and were applied by him for the benefit of H's estate; Rs. 1,000 were advanced to pay a debt due from L to third persons, the remainder being in respect of debts of H, all of which, however, with the exception of one debt of Rs. 100, were barred by the law of limitation. In a suit by the mortgagee for an account and sale, or foreclosure of the mortgaged property, it appeared that one of the minors had attained his majority when the mortgage was executed, and the other some years thereafter, and that both had been informed of the mortgage several years before the suit, and had then raised no objections. No question as to the effect of the limitation law on the mortgage was raised on the pleadings or at the trial.	
Held by MARKBY, J., that although the mortgage was not executed in accordance with the will of H, the younger sons had stood by and had taken the benefit of the transaction, and could not therefore question it. A member of a joint Hindu family is bound when he comes of age to make himself acquainted with the acts during his	

minority of the manager, and to express his dissent, or if he disapprove of such acts. Held also that Act XI. of 1858 does not prevent a guardian, who has obtained a certificate thereunder, from selling or mortgaging property in Calcutta without the sanction of the Court.

No evidence having been offered as to *L's* estate when the mortgage was executed, or that *L's* widow knew of the mortgage, the suit must be dismissed as against her.

Held, on appeal, by COUCH, C.J., and PONTREX, J., that debts by Hindu law being a charge upon the estate of the debtor, and the intention of *H*, as shown by the provision in his will for the maintenance of his widow and minor sons, being that the family should for a time continue to be joint, no charge or trust was created by the clause in *H's* will for payment of his debts, and therefore the fact that, in executing the mortgage, *H* professed to act under the will and not as *karta*, did not invalidate the mortgage. For the same reason, the clause for payment of debts could not prevent the operation of the law of limitation.

The manager of a joint Hindu family, or the executor of a Hindu will, has no power by acknowledgment to receive a debt barred by the law of limitation, except as against himself.

G, as *karta* of the joint family, could not make a valid mortgage of *L's* share separately from the shares of the other members of the family; his estate, therefore, was liable to pay the plaintiff the Rs. 1,000 borrowed to pay *L's* debt, and his representatives could claim to be repaid from *L's* estate.

GORALLABAI v. MOHOMDAN v. MUDDOMUTTY GUPTA.

SHOSHEETHOOSUN MOHOMDAN v. MUDDOMUTTY GUPTA.

MUDDOMUTTY GUPTA v. BAKASOONDERY DOSSEE.

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HINDU LAW—[*Widow's Accumulations*.] Immoveable property purchased by a Hindu widow with the profits of her husband's estate, there being no proof of any distinct intention on her part to sever such purchases from the estate and appropriate it to herself, held to form part of her husband's estate.

GONDA KOBAL v. KOOSA DASS SING.

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WILL—[*Dedication to Idols—Devotee's Property—Perpetuity—Trust*.] A Hindu by will devised certain property, consisting of a family dwelling-house and land, to trustees for ever, for the residence, maintenance, and performance of the worship, of certain family idols, and appointed his sons and their descendants in the strict male line to be *sevak*s of the idols for ever, making provision for their residence in the family dwelling-house; the will also contained a clause restraining any partition, division, or alienation of the property so dedicated to the worship of the idols. The testator appointed the trustees executors of his will, and by a codicil bequeathed legacies to various members of his family. In a suit against the executors to recover a legacy so bequeathed—

Held, the devise of the property to the idols was void and inoperative, as being a settlement in perpetuity on the male descendants of the testator, and for their use, and not a real dedication for the worship of the idols.

PROMOTHO DOSSEE v. RAUHIKA PERSAUD DUTT.

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INTERIM INJUNCTION—Contradictory Affidavits—Suit for Specific Performance—Irreparable Injury—Letters Patent, 1862 & 1865—Act VIII of 1859, ss. 92 & 94—Appealable Order.] The plaintiffs being in possession of a certain mud dock used for docking and repairing vessels, and being threatened by the defendants with a suit to eject them therefrom, sued for specific performance of an alleged agreement between themselves and the defendants, under which they were, on certain terms, entitled to the use and occupation of the dock until the repairs of two of their vessels were completed; and for an injunction to restrain the defendants from ejecting them until the completion of the repairs. In support of an application for an *interim* injunction to restrain the defendants from taking proceedings to eject the plaintiffs until their suit had been heard, the affidavits of the plaintiffs stated that on the faith of the agreement one of their steamers had been docked and taken to pieces; that the repairs could not be finished for a considerable time, and that the vessel could not be removed from the dock without great loss and irreparable injury to them. The affidavits of the defendants denied the making of the agreement alleged by the plaintiffs, and set forth another agreement, under which they alleged the plaintiffs had been in possession of the dock, and which agreement having come to an end they were entitled to eject the plaintiffs; they did not deny the loss to the plaintiffs which would be the result of moving the vessel before the repairs were completed, nor did they allege any delay in making the repairs, but they submitted that such loss would be the consequence of the plaintiffs' own act in docking their vessel without any final agreement having been come to between the parties. The dock was situated in the district of Hooghly, and the defendants' suit for possession, unless transferred to the High Court, would be tried in the Hooghly Court. There were facts which in the opinion of the Court went to show that the plaintiffs had acted *bond fide*. *Held*, (*per* MARLBY, J.) on the above facts, that inasmuch as the plaintiffs' statements if true raised a fair and substantial question for decision as to the rights of the parties, and looking to the inconvenience of allowing the same matter to be litigated simultaneously in different Courts between the same parties, the plaintiffs were entitled to an

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interim injunction restraining the defendants from bringing their suit, until the plaintiffs' suit was heard.

Semble.—An *interim* injunction may issue although there is a contradiction on the facts.

On appeal the Court was of opinion that, under the circumstances, there was an equity which entitled the plaintiffs to be kept in quiet and undisturbed possession of the dock until the repairs were completed; and confirmed the order for an *interim* injunction, but modified it by restraining the defendants not from bringing their suit, but merely from executing any decree they might obtain therein until the plaintiffs should have had a reasonable time to complete the repairs of their vessel.

Although by the Letters Patent of 1865, the provisions of Act VIII of 1859 were not expressly made applicable to the High Court, as was done by the Letters Patent of 1862,—*semble*—the order granting the injunction was an order under s. 92, Act VIII of 1859, and therefore an appeal lay under s. 94.

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JURISDICTION—*Cause of Action*—Act VIII of 1859, s. 5.] By a contract entered into at Beerpore, in the district of Nuddea, the plaintiff agreed to supply indigo-seed to the defendant, the seed to be paid for on delivery by an order to be sent to the plaintiff on receipt of the seed. The plaintiff resided at Berhampore, in the district of Moorshedabad, and the defendant carried on business at Beerpore, in the district of Nuddea, where delivery was to be made. The seed was delivered by the plaintiff as agreed, but the defendant refused to pay for it. In an action brought in the Moorshedabad Court to recover the price of the seed,—*held*, that the Moorshedabad Court had jurisdiction to entertain the suit. The refusal of payment by the defendant, which was to have been made in the district of Moorshedabad, was a sufficient cause of action under s. 5, Act VIII of 1859, to enable the plaintiff to sue in that Court.

Semble.—The words "cause of action" in that section do not mean the whole cause of action.

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JURISDICTION—European British Subject—Criminal Procedure Code (Act X of 1872)—24 & 25 Vict., c. 104, s. 9—26 Vict., c. 67 (<i>Indian Councils Act</i>), ss. 22 & 42— <i>Letters Patent</i> , 1862, cl. 21— <i>Letters Patent</i> 1865—34 & 35 Vict., c. 34.] A European British subject in the mofussil was convicted by a Magistrate under the provisions of Ch. vii of Act X of 1872. He appealed to the High Court on the ground (<i>inter alia</i>) that the Magistrate had no jurisdiction to try the case, inasmuch as the Governor-General in Council had not the power under 24 & 25 Vict., c. 67, to subject a European British subject to any jurisdiction other than that of the High Court, and therefore the provisions of Act X of 1872 under which the prisoner had been tried were <i>ultra vires</i> and illegal. <i>Held</i> that the jurisdiction of the High Court as given by the letters Patent is subject to the legislative powers of the Governor-General in Council, and therefore the Magistrate had jurisdiction to try the case.	
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————— <i>Execution of Decree.</i>] Where a decree had been obtained for a certain sum of money without interest, and afterwards a kistbandi was filed, by which the decree-holder and the judgment-debtor agreed that the amount of the decree should be paid by instalments with interest, and the judgment-debtor had, by his conduct for several years, treated the kistbandi as if it were a decree;— <i>held</i> , that, under the circumstances of the case, the judgment-debtor could not afterwards object that the kistbandi could not be executed as a decree, and that a fresh suit should be brought upon the kistbandi; but the decree-holder was entitled to take proceedings on the kistbandi as if it were part of the original decree.	
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—————.] There is no procedure under Act VIII of 1859, under which execution can be taken out upon a kistbandi, filed in Court after decree, which has not been incorporated with the decree.	
MADHUB CHUNDER DUNDEPUT V. MADHUB LALL KHAN	288 note
—————.] Where a decree was obtained for a sum of money, and afterwards by an arrangement between the judgment-debtor and the decree-holder it was agreed that the decree should be payable by instalments with interest at a very large rate, and payments had subsequently been made of large sums of money in the terms of the arrangement, and a balance remained due, it was held that the decree-holder could not recover in execution of the decree any sum beyond what was stated in the decree.	
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LANDLORD AND TENANT—Tiled Huts—Right of Tenant to remove—Custom of Calcutta—Acquiescence.]	On a case stating that the plaintiff became tenant to the defendant of certain land in Calcutta, and at the time of becoming such tenant purchased, from the out-going tenant, with the defendant's knowledge, two tiled huts, which were then standing on the land; that "it had been the practice in Calcutta for tenants to remove such tiled huts as those of the plaintiff, erected upon the land let to such tenants, and such huts were by such practice treated as the property of the tenants, who, by such practice, were in the habit of disposing of them without the consent of their landlords;" that relying on the above-mentioned practice, the plaintiff, with the defendant's knowledge, had partially pulled down and rebuilt such huts; that the plaintiff's tenancy was determined, and the plaintiff ejected from the land, by the defendant; that before leaving she endeavoured to pull down and remove the huts, but that she was prevented from so doing by the defendant, who claimed the huts as her property:—				
<i>Held</i> , that the plaintiff, by the practice stated, was entitled, before giving up possession of the land, to pull down and remove the tiled huts.					
<i>Held</i> further, that apart from the existence of a valid custom entitling the tenant to remove tiled huts, the plaintiff having bought the huts from the out-going tenant with the defendant's knowledge, and relying on the practice, and with the defendant's knowledge having partially pulled down and rebuilt the huts, was entitled as against the defendant to remove them.					
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<i>Building, Right of Tenant to remove—Additions to existing Building.]</i> A tenant, making additions to an existing building, is not entitled to remove the building, but is only entitled to compensation for the present value of the expenses incurred by him in making such additions. Possibly, in some cases, he may remove the additions if he can do so without in any way injuring the original building.					
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<i>Act XIV of 1859, s. 1, cl. 15, & s. 5—Laches—</i>	
<i>Estoppel—Mesne Profits.] The laches of a mortgagor in taking</i>	
<i>no steps for many years to enforce his alleged rights, may afford</i>	
<i>evidence against the existence of those rights, but cannot estop</i>	
<i>him from asserting them, if they do exist, at any time within the</i>	
<i>period of sixty years allowed by s. 1, cl. 15, Act XIV of 1859.</i>	
<i>A defendant who seeks to protect himself by the provisions of</i>	
<i>s. 5, Act XIV of 1859, against the claim of a mortgagor suing</i>	
<i>within sixty years to recover mortgaged lands, must show clearly</i>	
<i>that he or the person from whom he derives his title was a bona</i>	
<i>fide purchaser.</i>	
<i>On account of the plaintiff's laches the Judicial Committee</i>	
<i>disallowed mesne profits prior to the date of the institution of the</i>	
<i>suit; which had been allowed by the High Court.</i>	
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Foreclosure—Reg. XVII of 1806, s. 8—Cause of Action.] A, by a Bengali deed of conditional sale dated the 10th of August 1853, mortgaged two estates, the deed providing that the mortgage-debt should be repaid on the 9th of July 1855, and that, on default of payment, the deed of conditional sale should become one of absolute sale, and that the mortgagee should thereupon acquire the absolute proprietary right, and might enter upon and retain possession of the mortgaged property. A failed to pay at the time stipulated, and on the 18th of December 1856 her right, title, and interest in the estates were sold in execution, and purchased by the defendants without notice of the mortgage. On the 3rd of April 1866, the plaintiff bought the mortgagor's interest, and in August 1867 he instituted foreclosure proceedings under Regulation XVII of 1806 against the defendants, the auction-pur-

chasers. In a suit instituted by the plaintiff on the 22nd January 1874, against the auction-purchasers, to recover possession of the mortgaged property, *held*, that the cause of action arose on 9th July 1865, when default was made in payment of the mortgage-debt, and the suit not having been instituted within twelve years from that date, was barred by s. 1 cl. 12, Act XIV of 1859. No new cause of action arose by reason of the foreclosure proceedings on the expiry of the year of grace in August 1868.

Where notice of foreclosure was shown to have been served according to the usual course of business in the Sheriff's office, the Court presumed that a copy of the application had been duly served therewith; but where it appeared that, according to the practice of the High Court, mention of the application would have been made in the order if it had accompanied the notice, and no such mention was made, the Court refused to make such presumption.

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MORTGAGE—Payment of Interest—Adverse Possession—Limitation.]

The defendant mortgaged certain immoveable property to the plaintiff by a *bis-bil-wafa*, or deed of conditional sale, dated 20th January 1851. The deed stipulated that the mortgage-debt should be repaid on the expiration of three years from the date of the execution. The money was not repaid at the stipulated period, and the mortgagor remained in possession of the property, but there was some evidence to show that he had made payments of interest on the mortgage-debt to the plaintiff. In February 1870 the plaintiff took proceedings to foreclose the mortgage, and on 16th February 1872 he instituted a suit for possession of the property. The defence was that the suit was barred, the plaintiff having been out of possession for more than twelve years previous to the institution of the suit. *Held*, that payment and acceptance of interest was evidence of the continuance of the relation between the parties created by the mortgage-deed, and until the mortgagor advanced any rights adverse to the mortgagee, the possession of the mortgagor was permissive, and no cause of action accrued to the mortgagee.

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MORTGAGEE'S LIEN—Act VIII of 1859, ss. 2 & 32—Act XX of 1866, ss. 52, 53, & 55.] A regular suit will lie for a declaration, that property mortgaged by a bond on which a simple money-decree had been obtained by the mortgagee under the provisions of Act XX of 1866 continues liable for the decree, though in the hands of third persons.

OOTSHUB NARAIN CHOWDREY v. CHITTRA BECKA GOOPTA 411 note

..., s. 7—*Limitation—Interest in Land—Multifariousness.*] S. 7 of Act VIII of 1859 does not bar a suit for a declaration that property in the defendant's possession is subject to the mortgagee's lien, on the ground that such property was part of the property mortgaged, and was not included in a previous suit against other parties for other portions of the property mortgaged.

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Money-Decree.] A mortgagee who obtains a simple money-decree upon a bond by which property is mortgaged to him as a collateral security, does not retain his lien on the property mortgaged after it has passed into the hands of third persons.

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MORTGAGEE'S LIEN—*Money-decree—Act VIII of 1859, ss. 1 & 2—Act XX of 1866, s. 53.*] The taking a money-decree on a specially registered mortgage-bond under s. 53, Act XX of 1866, does not extinguish the mortgagee's lien on the property mortgaged by the bond. There is no substantial difference between the effect of an ordinary money-decree on the bond, and a decree on the bond for sale of the mortgaged property; so that the remedy of the mortgagee is the same, so far as the parties to the suit are concerned, whether the decree be made under s. 53, or in a regular suit. A proceeding under s. 53 is a suit of a civil nature within the meaning of s. 1, Act VIII of 1859, independently of any peculiarities in the special procedure to be adopted. Therefore, where a creditor has resorted to the summary procedure provided by s. 53, and has recovered a portion of his claim in execution of the decree so obtained, a regular suit subsequently brought to enforce his remedies on the bond, giving the defendant credit for the amount already recovered, is barred by s. 2, Act VIII of 1859. But where the property mortgaged has passed into the hands of third parties, there is nothing in the fact that the mortgagee had obtained a decree on the bond, to prevent him from bringing a separate suit against the transferees.

SYUD EMAM MONTAZOORDEEN MAHOMED v. RAJCOOMAR DASS.
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Striking off Execution Proceedings—Effect of Assignment of Judgment-debt—Sale of Property on which there is a Lien—Act XIV of 1859, s. 20—Act VIII of 1859, s. 270.] The striking off of an execution-proceeding affects only the files of the Court and the application for sale, and does not interfere with the continuance of any attachment under the decree which is executed.

A simple decree for money upon a bond by which immoveable property is mortgaged, carries with it a lien upon the property mortgaged, and that lien continues as an incident to the debt when it passes from a contract-debt into a judgment-debt, and it continues when such judgment-debt is subsequently assigned to a purchaser.

An attachment under a money-decree on a mortgage bond and a mortgage lien cannot co-exist separately in the property hypothecated, and such an attachment must be treated when existing as an attachment for enforcing the lien. And if property subject to such lien is sold in execution of a decree while it is under attachment under the decree upon the mortgage bond, the lien existing upon the property is transferred from the property to the purchase-moneys, and thereupon the property becomes thenceforth discharged from the lien. If after the rejection of a claim preferred by the mortgagee, or person claiming the lien, no regular suit is brought under s. 270 of Act VIII of 1859 to enforce the lien, that lien is lost, and the decree becomes thenceforth a mere money-decree discharged from any incidental lien.

In order to keep a decree alive, s. 20 of Act XIV of 1859 does not require more than that some actual proceeding should be taken, which, if successful, would result in the discharge or partial discharge of the judgment-debt. The proceeding need not be by a person legally and rightfully entitled to the decree.

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Kistbandi—Form of Decree.] A kistbandi, or arrangement to pay by instalments the

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amount of a decree obtained upon a bond, does not effect an extinction of the original debt or the mortgagee's lien upon property mortgaged to him by the bond.	
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PARTITION— <i>Right to enforce—Joint Ownership.</i>] In all cases of joint ownership, each party has a right to demand and enforce partition.	
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— <i>Joint Ownership in Right of Worship of Idol.</i>] The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns.	
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POSSESSION, DELIVERY OF— <i>Title—Hindu Law—Vendor and Purchaser.</i>] Delivery of possession is not necessary to the transfer of ownership among Hindus.	
Per MARKBY, J.—As a general rule of law, when a vendee has got a document which in terms professes to make over property, and the document is registered (in case registration is necessary), he becomes at once the owner without actual delivery of possession.	
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<i>Appeal—Delivery of Paper Books—Costs—Rule 49 of Original Side.</i> Where the respondent has not delivered paper books, as he is allowed to do by Rule 49 of the Rules of the High Court, Original Jurisdiction, on default of the appellant to deliver them, and the appellant does not appear at the hearing, the appeal will be dismissed without costs.	
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RAILWAY COMPANY—<i>Fire caused by Spark from Engine—Action for Damages—Negligence—Statutory Powers.</i> The East Indian Railway Company was incorporated under 12 & 13 Vict., c. 93, "for the purpose of making and constructing, working and maintaining" the East Indian Railway, including all necessary, accessory, or convenient extensions, branches, &c., as might be agreed upon between the Railway Company and the East India Company; and by agreement between the Railway Company and the East India Company, dated 17th August 1849, the Railway Company was "authorized and directed to make and maintain such stations, offices, machinery and other works and conveniences connected with the making, maintaining, and working the railway," and "to provide a good and sufficient working stock of engines, carriages, and other plant and machinery for working the said railway." The plaintiff was the owner of a piece of land adjoining the railway line at Kharmatta, a station on the Chord Line of the Company's railway, on which land was erected a bungalow, with stables and out-houses adjoining. In an action brought by the plaintiff against the Railway Company to recover compensation for damages occasioned by a fire caused by a spark from one of the engines of the Company, the plaintiff alleged want of due care on the part of the defendants in the management of the line by allowing dry grass of too great a length to remain on the railway banks, and in driving their engines along the line without due precautions being taken to prevent the expulsion of sparks. <i>Held</i>, that the defendant Company was authorized to run locomotive engines on the lines of railway constructed by the Company under the statutory powers given to it, and, therefore, the Company were not liable for damage caused in working the line under such statutory powers, without proof of negligence. <i>Held</i> also on the evidence that neither in the construction of their engines, nor in the condition of the railway banks, was any negligence shown on the part of the Company.	
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REFERENCE BY SMALL CAUSE COURT TO HIGH COURT—

Deposit of Security for Costs—Act XXVI of 1864, s. 8.] A case should not be referred to the High Court by a Judge of the Small Cause Court, until security has been deposited in accordance with s. 8, Act XXVI of 1864, by the party against whom the judgment has been given. If such party do not deposit the security "forthwith" he must be taken to submit to the judgment of the Small Cause Court.

- When, however, a case was sent up without security for costs being deposited, and before the case was heard, the plaintiffs tendered a sum as security, which the Judge refused to accept as being too late, the High Court, on the sum being deposited, and it appearing that the defendant would not be prejudiced by such a course, allowed the case to be heard.

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1819—VIII, s. 8, cl. 2—"Substantial Persons"—*Service of Notice—Special Leave to appeal to Privy Council—Practice.* The provisions of cl. 2, s. 8, Regulation VIII of 1819, with regard to the Notification of the sale of a patni talook for arrears of rent under that Regulation, that the serving peon shall "bring back the receipt of the defaulter or of his manager for the same, or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood in attestation of the notice having been brought and published on the spot," are merely directory, and where there is proof that the notice was in fact served, the sale will not be vitiated by non-compliance with any of these provisions, e.g., as where one of the witnesses attesting the service of the notice turns out not to be "substantial."

A respectable man, of good character, living and well known in the neighbourhood, may properly be considered a "substantial person," within the meaning of [cl. 2, s. 8 of the Regulation: it is too limited a construction of that clause to hold that the word "substantial" must be taken to mean a wealthy man, from whom damages could be recovered by the patnidar supposing the attestation to be false.

Where special leave to appeal to the Privy Council is granted upon a petition in which material mis-statements are made, objection should be taken by the respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on. Where it was not clear that the material mis-statements in the petition had been made with an intention to deceive, and the objection to the appeal was only taken at a late stage of the hearing, the Judicial Committee declined to dismiss the appeal, but refused the appellant the costs of the appeal.

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REVIEW, APPLICATION FOR— <i>Act VIII of 1859, s. 377.</i>] Where a party applying for a review of judgment after the expiry of the period of ninety days allowed by s. 377, Act VIII of 1859, had not, as required by that section, shown any just and reasonable cause for not preferring his application within the proscribed period, the order admitting the review was held to have been improperly granted, and was set aside with all subsequent proceedings thereon. LUCHMUN SINGH v. TIRBANI BUKSH.	373
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SALE FOR ARREARS OF REVENUE— <i>Act XI of 1859, ss. 10, 11, & 13—Separation of Shares—Private Batwara—Rights of Auction-Purchasers—Suit by Purchaser at Private Sale for Posses- sion of specific Share.</i>] The proprietors of a joint mehal, the jama of which had been partitioned under s. 10, Act XI of 1859, were in possession of specific shares under a private arrangement among themselves, but had not obtained separation of shares under s. 11. One of the proprietors sold his share to the plaintiff, and the shares of two other proprietors who made default in payment of the revenue were sold under s. 13, Act XI of 1859, and purchased by the defendants. In a suit for exclusive possession of the share purchased by the plaintiff,— <i>held</i> , that the defendants acquired by their purchase an interest in the property as an undivided estate, and the plaintiff was not entitled as against them to have exclusive possession of any specific share. GUNGADEN MISSEER v. KHEERBOO MUNDUL	170
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by a husband for restitution of conjugal rights, a decree that "the	
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married wife." is not a proper form of decree.	

The decree may order the wife to return to her husband's protection, but such a decree is not one which can be enforced in the manner provided by s. 200, Act VIII of 1859, as being an order "for the performance of a particular act."

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SUPERINTENDENCE OF HIGH COURT—24 & 25 Vict., c. 104, s. 15—*Circumstances disentitling Party to Relief.*] A party applying to the High Court for relief under s. 15 of 24 & 25 Vict., c. 104, must clearly show that he has not contributed by his own conduct to his being placed in the position he finds himself in.

A decree for possession with wasilat of certain lands appertaining to an indigo concern was obtained in a suit against *B* as manager on behalf of *G M and Co.*, the proprietors of the concern although no member of *G M and Co.*, was living when the suit was instituted. In execution of this decree the plaintiff obtained possession of the lands. The executors of *M*, the last surviving member of *G M and Co.*, having subsequently assigned the concern to *A*, who also took upon himself the *dena-pana*, the plaintiff applied under s. 210 to execute the decree against *A* in respect of wasilat; and two successive notices under s. 216 were issued to *A* to show cause why the decree should not be executed against him. *A* being advised that the suit was a nullity, and that under no circumstances could execution be had against him as heir or legal representative of any of the judgment-debtors, neglected to appear, and certain property belonging to him was sold in execution of the decree without opposition on his part, and the sale having been duly confirmed, the purchaser, who was also the decree-holder, was put into possession. *A* thereupon applied to the Court executing the decree to have the sale set aside, and his application being refused, petitioned the High Court under s. 15 of 24 & 25 Vict., c. 104, for the same relief. The High Court, however, refused to interfere both upon the principle above stated, and likewise because the purchaser, being also the decree-holder, could not successfully oppose a suit by *A* to have the sale set aside.

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UNSETTLED POLLIAM—*Hereditary Tenure—Evidence—Proprietor of Land—Bengal Code of 1793—Proprietary Possession—Madras Regs. XXV & XXXI of 1802—Construction of Statute—Hindu Law—Legitimacy.*] The affirmative words of Madras Regulation XXV of 1802, s. 2, the preamble thereto forming no part of the enactment, did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The words "proprietors of lands," as used both in the Bengal Code of 1793 and in the Madras Code of 1802, have a technical signification. They refer to "zemindars, independent talookdars, and others who pay the revenue assessed upon their estates, immediately to Government." So also the words "proprietary possession" in the recital of Regulation XXV of 1802, means the possession of a person who is a proprietor according to the technical meaning of the term.

According to the true construction of Madras Regulations XXV and XXXI of 1802, the Legislature recognizes the right of private property, and does not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, independently of any considerations connected with the realization of the public revenue. It provides for the protection of the revenue from invalid lakhiraj grants, and for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue.

There is no long uniform current of decisions at Madras sufficient to show that every polliam, not permanently settled, is necessarily only a tenure for life, or at the will of the Government. Each case must depend upon its own particular circumstances. The existence of a proprietary estate therein, and the tenure by which it has been held, are matters judicially determinable on legal evidence.

In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a polliam and an ordinary zemindari.

Under Hindu law, it is not necessary, in order to render a child legitimate, that the procreation as well as the birth should take place after marriage.

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Notice—Joint Hindu Family—Presumption of Joint Estate—Nucleus—Relief. When a person has notice that another has or claims an interest in property for which he is dealing, he is bound to enquire what that interest is; and if he purchases without doing so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest.

Where the notice is given by the person himself who claims an interest in the property, and it is afterwards proved that he had such an interest,—*quære* whether any amount of enquiry can discharge the purchaser from liability.

Presumably, every Hindu family is joint in food, worship, and estate; and this presumption applies in the absence of any evidence of a nucleus of joint property, and even without evidence that the family is undivided. A purchaser, therefore, from one member of a Hindu family is affected with notice of the claims of the other members.

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Although the plaintiff was found not to be entitled to the special relief prayed for, the Court considered he had established a case, in which, upon the plaint and the general prayer for relief, he was entitled to a decree.	
On the facts held (reversing the decision of the Court below) that no sufficient enquiry had been made in this case.	
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— *Proviso for Cesser—Conditional Limitation—Breach of Condition—Residence.*] *P O T*, a Hindu, died, leaving an only son *G M T*, and having made a will in English form, whereby, after declaring that he had already made sufficient provision for *G M T*, and that he was to take nothing under the will, he gave all his property to trustees, as to the personality upon trust "to collect and get in the same (save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and their own use)," and after paying debts and such legacies as were not by the will postponed in payment, to invest the residue, and pay out of the income certain annuities, and the postponed legacies as they become due; and to pay the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of the real property or the profits thereof; and as to the realty, upon trust until the debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities if the personality should be inadequate, and subject thereto to pay the residue to the person for the time being entitled to his real estate under the limitations thereafter contained "for the absolute use of such person." The testator further directed that the trustees should hold the estate generally for the use and benefit of such person so far as was consistent with the trusts and provisions of the will: that out of the income, after paying the necessary costs of managing the estate, "including the expense of the establishments in the mofussil and Calcutta," such person should receive Rs. 80,000 per annum; and that, as soon as the legacies and annuities were paid and had fallen in, the trustees should convey the real estate unto and to the use of the person or persons who should be entitled to the beneficial interest therein. The testator then devised (subject to the devise to the trustees) his "real property" and also his "library, horses, carriages, farmyard, furniture of the *baithakhana*, jewels, gold and silver plates, &c.," to *J M T* for life, and to the sons of *J M T* successively in tail-male, with subsequent limitations over in the English form. The will then contained the following proviso:—

"Provided always, and I hereby declare that if any devisee,

or tenant for life.....shall permit or suffer the said property so devised and limited as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall, after attaining his majority, cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said *baithakhana* house and premises where I now reside, and make use of and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use or possession, then and immediately thereupon, the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed" as if the person committing any breach of such conditions had then died. The testator died in August 1868; and shortly afterwards *G M T* brought a suit to set aside the trusts and limitations in the will, except so far as they were for the payment of debts, legacies, and annuities, in which suit the final order of the Privy Council of 9th August 1872 declared all the limitations subsequent to the life-interest given to *J M T* to be void and inoperative; and further declared that *J M T* was entitled to a life-interest in the realty, and also in the personalty directed to be conveyed or converted into a fund, subject to the payments in the will directed to be made and to the provisions in the will not declared to be void, and also, until the legacies and annuities fell in and were satisfied, to Rs. 2,500 a month out of the realty, and also to the surplus rents of the same and the surplus interest of the personalty; and that upon the failure or determination of the life-interest of *J M T*, *G M T* was entitled as heir-at-law to the real and personal property.

The proviso for cesser was not among the provisions of the will which were declared void. *J M T* was one of the trustees under the will. After the testator's death the business of the estate continued, as theretofore, to be carried on in a portion of the *baithakhana* house: and *J M T*, who had a family dwelling-house of his own, used, up to November 1869, to attend at the *baithakhana* daily for the transaction of business. In November 1869 *J M T* quarrelled with his co-trustees, and ceased to go to the *baithakhana*. In April 1870 he demanded from the other trustees that possession of the *baithakhana* should be given to him, and upon their insisting on the right to occupy the portion of the *baithakhana* used for the purpose of the estate business, sued them for possession. In July 1870 a decree for possession was made in his favor: the trustees appealed, and ultimately, in July 1871, the Appellate Court made a declaration that it was consistent with the trusts of the will that *J M T* should enter into possession; and the trustees were ordered to deliver to him possession of the *baithakhana*, except the portion of the ground-floor occupied for the business of the estate. After obtaining this decree, *J M T* found that the *baithakhana* was in a very bad state of repair, and called upon the trustees to have proper repairs executed. On their refusal to do so, except under direction of the Court *J M T*, in December 1871, brought a suit to compel them to effect the necessary repairs the trustees contested the suit, but in March 1872 a decree was passed directing them to make the repairs. Subsequently, repairs were begun which were completed in October 1872.

In a suit by *G M T*, alleging that *J M T* had committed a breach of one or more of the conditions contained in the proviso for cesser, by not residing in the *baithakhana* house and by neglecting to keep it in repair, and had thereby incurred a forfeiture of which the plaintiff was entitled to take advantage.

Held that as the clause provided for the ceaser and determination of the life-interest of *J M T* in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over had been declared to be void, would cease when that event happened.

Held that the clause could not be construed so as virtually to defeat it, and therefore it must be held to be operative before the trusts of the will were at an end, and *J M T's* estate perfected by a conveyance.

But *held*, on the evidence, that there had been no breach of the condition contained in the clause. The delay in not residing before October 1872 was not unreasonable.

Where in a condition of residence, no manner or period of residence is prescribed, but residence simply, and without definition exclusive residence is not supposed to be meant; in such cases the occasional use of a house and keeping an establishment in it with the intention of again using it as a residence, is a sufficient compliance with the condition.

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WILL, CONSTRUCTION OF—*Charitable Devise—Hospital—Clause prohibiting Alienation.* A testator left his personal property to trustees in trust to pay thereout certain annuities to his son and daughter, and after bequeathing some pecuniary legacies, devised certain immoveable property to the trustees in perpetuity in trust for the support of hospitals in the North-West Provinces, with directions that the surplus income (if any) from his personality during the lives of his children, and on the death of either of them, his or her annuity, and on the death of both of them, the whole income of the personality should be applied in support of the hospitals. The will also contained a provision that the property should never be sold. In a suit for the construction, and for declaration of the trusts, of the will, it appeared that the income of the personality was not more than sufficient, after payment of the legacies, to pay the annuities to the testator's children, and that the immoveable property was greatly in need of repairs and did not produce enough for the support of the hospitals, or to enable the trusts of the will relating thereto to be carried out. *Held*, that the devise for the support of the hospitals was a valid devise, and one to which the Court would give effect, as being a charitable trust within the scope of 43 Eliz., c. 4. The Statutes of Mortmain not applying to India, the Court will carry out such a trust when the subject is immoveable property, just as it would if it had been personal property. *Held* also that, if the prohibition against sale were a valid one, the Court could not order a sale merely because it would be advantageous to the charity that the property should be sold; but *held* that the prohibition against sale was void as being repugnant to the devise, and, notwithstanding such prohibition, the trustees had power to sell, or otherwise alienate, the property for the purpose of maintaining the hospitals.

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—*Privilege from Arrest—Bona Fides.* Where a witness was arrested in execution of a decree, and the circumstances under which the arrest had taken place showed the absence of a *bona fide*

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belief on his part that his attendance at Court was required for the purpose of giving evidence in the case in which he had been subpoenaed, the Court refused to allow his claim to privilege from arrest.

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ZEMINDAR, DUTY OF—*Ancient Tanks—Negligence—Statutory Powers—Liability for Damage occasioned by Overflow of Tanks*]

The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved upon zemindars. Such zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such zemindars with regard to their tanks are analogous to those of persons or corporations, on whom statutory powers have been conferred and statutory duties imposed.

A zemindar, if the banks of any such tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby.

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